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8596
No. 12324

**United States
Court of Appeals**
for the Ninth Circuit.

**AUDREY CUTTING and SYLVIA A. HENDER-
SON,**

Appellant,

vs.

RAY BULLERDICK, et al,

Appellees.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 116)

**Appeal from the District Court for the
Territory of Alaska,
Third Division**

FILED

AUG 4 1950

PAUL P. O'BRIEN,
CLERK

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDER-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ture.

In the District Court for the Territory of Alaska,
Third Division

No. A-5087

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKLIN, LEE RUNKLE, ARDEN
BELL, and WILLIAM BESSER,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

COMPLAINT

Come now the plaintiffs in the above-entitled action, and complaining against the defendants herein, for their respective causes of action severally allege as follows:

First Cause of Action

The plaintiff, Ray Bullerdick, for cause of action alleges:

I.

That at all times hereinafter mentioned the defendant, Ralph R. Thomas, was, ever since, has been and now is, the owner of that certain real property situate in the City of Anchorage, Alaska, particularly described as follows, to wit:

Lot Two (2) in Block Thirty-Seven D (37D)
of the South Addition to the City of Anchorage,

Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska.

II.

That during all the times hereinafter mentioned the defendant, Audrey Cutting, was, ever since has been, and now is, the reputed owner of the above-described premises, and has or claims to have some right, title, or interest in said premises, the nature of which is unknown to the plaintiffs in this action and therefore not stated.

III.

That during all the times hereinafter mentioned the defendant, Russell W. Smith, had charge of and was engaged in the construction of a building on the premises hereinbefore described, under a contract with the defendant, Audrey Cutting, the nature and terms of which are unknown to the plaintiffs in this action and therefore not stated; that said construction was with the knowledge, consent and at the instance of the defendant, Ralph R. Thomas.

IV.

That the whole of the premises hereinbefore described is required for the convenient use and occupation of the building hereinbefore mentioned.

V.

That on or about the 15th day of May, 1948, the

defendant, Russell W. Smith, employed plaintiff to work as a carpenter in the construction of the building hereinbefore mentioned, on the premises hereinbefore described, at the agreed wage of \$2.66 per hour. That pursuant to said employment, during the period beginning May 15th, 1948, and ending June 19th, 1948, this plaintiff performed 236 hours labor on said building as a carpenter, and there became due and owing from defendant to said plaintiff for said services the sum of Six Hundred and Twenty-seven Dollars and Seventy-six Cents (\$627.76). That the defendant has not paid the same nor any part thereof although frequently requested so to do, and the same is now due and owing from defendant to plaintiff.

VI.

That by reason of the premises plaintiff acquired a lien upon the premises hereinbefore described, including the building constructed thereon as aforesaid, for the sum due him as aforesaid, and for the purpose of securing and perfecting his said lien, plaintiff on the 30th day of June, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a true statement of his demand, duly verified by him, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the name of the person by whom he was employed, and also a description of the property to be charged with said lien sufficient for identification; that said

statement was duly recorded in Book 70 of City records of said recording precinct at Page 247.

That plaintiff paid for filing and recording said lien statement the sum of \$2.55.

VII.

That the sum of Seven Hundred and Fifty Dollars (\$750.00) is a reasonable amount to be allowed by the court as attorney fees for the prosecution of this suit.

Second Cause of Action

The plaintiff, A. L. Baxley, for cause of action alleges:

I.

Plaintiff re-affirms, re-alleges and adopts as a part of his cause of action, all the allegations set forth in paragraphs I, II, III, IV, and VII of the first cause of action of this complaint.

II.

That on or about the 3rd day of May, 1948, the defendant, Russell W. Smith, employed plaintiff to work as a carpenter in the construction of the building hereinbefore mentioned, on the premises hereinbefore described, at the agreed wage of \$2.66 per hour; that pursuant to said employment, during the period beginning May 3rd, 1948, and ending June 10th, 1948, plaintiff performed 268 hours labor as a carpenter on said building and there became due and owing from defendant to plaintiff for said services the sum of Seven Hundred and Twelve Dollars and Eighty-eight Cents (\$712.88).

That the said defendant is also indebted to this plaintiff for lumber furnished by plaintiff to defendant at defendant's request, during the period last mentioned, which was used by defendant in the construction of said building, and for which defendant promised and agreed to pay.

That the defendant has not paid the amounts so due as aforesaid for services rendered and material furnished, nor any part thereof, although frequently requested so to do, and by reason of the premises the sum of Nine Hundred and Fourteen Dollars and Eighty-eight Cents (\$914.88) is now due and owing from defendant to plaintiff.

III.

That by reason of the premises plaintiff acquired a lien upon the premises hereinbefore described, including the building constructed thereon as aforesaid, for the sum due him as aforesaid, and for the purpose of securing and perfecting his said lien plaintiff on the 30th day of June, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of his demand, duly verified by him, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the name of the person by whom he was employed and to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification; that said claim was duly recorded in Book 70 of City Records of said recording district and

precinct on Page 246; that plaintiff paid for filing and recording his said claim the sum of \$2.55.

That a true and correct copy of said Claim of Lien is hereunto annexed, marked "Exhibit B" and made a part of this complaint.

Third Cause of Action

The plaintiff, Edward C. Rankin, for cause of action alleges:

I.

Plaintiff re-affirms, re-alleges and adopts as a part of his cause of action, all the allegations set forth in paragraphs I, II, III, IV, and VII of the first cause of action of this complaint.

II.

That on or about the 17th day of May, 1948, the defendant, Russell W. Smith, employed plaintiff to work as a carpenter in the construction of the building hereinbefore mentioned on the premises hereinbefore described, at the agreed wage of \$2.66 per hour; that pursuant to said employment, during the period beginning May 17th, 1948, and ending June 12th, 1948, plaintiff performed 186 hours labor as a carpenter on said building and there became due and owing from defendant to plaintiff for said services the sum of Four Hundred and Ninety-four Dollars and Seventy-six Cents (\$494.76); that the defendant has not paid the same nor any part thereof although frequently requested so to do, and the same is now due and owing from defendant to plaintiff.

III.

That by reason of the premises plaintiff acquired a lien upon the premises hereinbefore described, including the building constructed thereon as aforesaid, for the sum so due him as aforesaid, and for the purpose of securing and perfecting his said lien plaintiff on the 30th day of June, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of his demand, duly verified by him, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification; that the said claim was duly recorded in Book 70 of City Records of said recording precinct on Page 245.

That a true and correct copy of said Claim of Lien is hereunto annexed, marked "Exhibit C" and made a part of this complaint.

That plaintiff paid for filing and recording his said claim the sum of \$2.55.

Fourth Cause of Action

The plaintiff, Lee Runkle, for cause of action alleges:

I.

Plaintiff re-affirms, re-alleges and adopts as a part of his cause of action, all the allegations set forth in paragraphs I, II, III, IV, and VII of the first cause of action of this complaint.

II.

That on or about the 3rd day of May, 1948, the defendant, Russell W. Smith, employed plaintiff to work as a carpenter in the construction of the building hereinbefore mentioned on the premises hereinbefore described at the agreed wage of \$2.66 per hour; that pursuant to said employment during the period beginning May 3rd, 1948, and ending June 10th, 1948, plaintiff performed 276 hours labor as a carpenter on said building and there became due and owing from defendant to the plaintiff for said services the sum of \$734.16; that the defendant has not paid the same nor any part thereof, although frequently requested so to do and the same is now due and owing from defendant to plaintiff.

III.

That by reason of the premises, plaintiff acquired a lien upon the premises hereinabove described, including the building constructed thereon as aforesaid, for the sum so due him as aforesaid and for the purpose of securing and protecting his said lien, plaintiff on the 30th day of June, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of his demands, duly verified by him, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification; that the said claim was duly recorded in Book 70

of City Records of said Recording Precinct on Page 247.

That a true and correct copy of said Claim of Lien is hereunto annexed, marked "Exhibit D" and made a part of this complaint.

That plaintiff paid for filing and recording his said claim the sum of \$2.55.

Fifth Cause of Action

The plaintiff, Arden Bell, for cause of action alleges:

I.

Plaintiff re-affirms, re-alleges and adopts as a part of his cause of action, all the allegation set forth in paragraphs I, II, III, IV, and VII of the first cause of action of this complaint.

II.

That on or about the 3rd day of May, 1948, the defendant, Russell W. Smith, employed plaintiff to work as a carpenter in the construction of the building hereinbefore mentioned on the premises hereinbefore described, at the agreed wage of \$2.66 per hour; that pursuant to said employment, during the period beginning May 3rd, 1948, and ending June 11th, 1948, plaintiff performed 286 hours labor as a carpenter on said building and there became due and owing from defendant to plaintiff for said services the sum of Seven Hundred Sixty and 76/100 Dollars (\$760.76); that the defendant has not paid the same nor any part thereof although

frequently requested so to do, and the same is now due and owing from defendant to plaintiff.

III.

That by reason of the premises plaintiff acquired a lien upon the premises hereinbefore described, including the building constructed thereon as aforesaid, for the sum so due him as aforesaid, and for the purpose of securing and perfecting his said lien plaintiff on the 30th day of June, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of his demand, duly verified by him, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification; that the said claim was duly recorded in Book 70 of City Records of said recording precinct on Page 248.

That a true and correct copy of said Claim of Lien is hereunto annexed, marked "Exhibit E," and made a part of this complaint.

That plaintiff paid for filing and recording his said claim the sum of \$2.55.

Sixth Cause of Action

The plaintiff, William Besser, for cause of action alleges:

I.

Plaintiff re-affirms, re-alleges and adopts as a

part of his cause of action, all the allegations set forth in paragraphs I, II, III, IV, and VII of the first cause of action of this complaint.

II.

That on or about the 18th day of May, 1948, the defendant, Russell W. Smith, employed plaintiff to work as a laborer in the construction of the building hereinbefore mentioned and on the premises hereinbefore described, at the agreed wage of \$2.00 per hour; that pursuant to said employment, during the period beginning May 18th, 1948, and ending May 21st, 1948, plaintiff performed 32 hours labor as a laborer on said building and premises and there became due and owing from defendant to plaintiff for said services the sum of Sixty-four Dollars (\$64.00); that the defendant has not paid the same nor any part thereof although frequently requested so to do, and the same is now due and owing from defendant to plaintiff.

III.

That by reason of the premises plaintiff acquired a lien upon the premises hereinbefore described, including the building constructed thereon as aforesaid, for the sum so due him as aforesaid, and for the purpose of securing and perfecting his said lien plaintiff on the 9th day of July, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of his demand,

duly verified by him, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification; that the said claim was duly recorded in Book 70, of City Records of said recording precinct on Page 267.

That a true and correct copy of said Claim of Lien is hereunto annexed, marked "Exhibit F" and made a part of this Complaint.

That plaintiff paid for filing and recording his said claim the sum of \$2.25.

Wherefore, the plaintiffs pray:

1. That the Court decree that the plaintiffs, and each of them, have liens upon the said premises herein described, including the building thereon, for the sums respectively due them, as alleged in the Complaint, with interest according to law, and costs and disbursements, including attorney's fees, and expense of filing and recording said Claims of Lien, and

2. That all of said real property and the building thereon be sold under order and decree of this Court according to law and the proceeds thereof applied to the payment of the sums found due to plaintiffs, as aforesaid; that the plaintiffs, or any of them, may become purchasers at said sale, and that said plaintiffs may have such other and further

relief as to the Court may seem equitable in the premises.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska—ss.

Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell, and William Besser, being first duly sworn, each for himself, and not one for the other, deposes and says: That he is one of the plaintiffs in the above-entitled action, that he has read the foregoing Complaint and knows the contents thereof and that the same so far as it relates to his separate cause of action is true as he verily believes.

/s/ RAY BULLERDICK,
/s/ A. L. BAXLEY,
/s/ EDWARD C. RANKIN,
/s/ LEE RUNKLE,
/s/ ARDEN BELL.

Subscribed and sworn to before me this 22nd day of July, 1948.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My commission expires May 19, 1951.

United States of America,
Territory of Alaska—ss.

George B. Gribsby, being first duly sworn, deposes and says: That he is the attorney for the plaintiffs in the above-entitled action, that he has read the foregoing Complaint and knows the contents thereof, and that the same is true as he verily believes insofar as it relates to the separate cause of action of the plaintiff, William Besser; that this Complaint is verified by affiant and not by the said William Besser for the reason that the said William Besser is not present in Anchorage, Alaska, at the time this verification is made, and where the same is made.

/s/ GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 23rd day of July, 1948.

[Seal] /s/ FLORENCE E. CHAPMAN,
Notary Public for Alaska.

My Commission expires: 4/5/52.

EXHIBIT "A"

RAY BULLERDICK,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37 D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimant, Ray Bullerdick, claims a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2), in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the building thereon situated.

This lien hereby claimed is for labor performed on said premises as a carpenter in the construction of the building now on said premises.

That said services were performed during the period beginning May 15, 1948, and ending June 19, 1948, and consisted of 236 hours labor at the agreed wage of \$2.66 per hour and there is now

due and owing to this claimant for said services, after deducting all just credits and off-sets, the sum of \$627.76. That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting.

That this claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned.

That the said Russell W. Smith had charge of the construction of said building under a contract with the above-named Audrey Cutting.

Wherefore, this Claimant claims a lien upon afore-described premises and for services above mentioned in the sum of \$627.76.

/s/ RAY BULLERDICK.

Duly verified.

EXHIBIT "B"

A. L. BAXLEY,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37 D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimant, A. L. Baxley, claims a lien upon the fol-

lowing described premises situate in the City of Anchorage, Alaska, to wit:

Lot two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the Precinct of Anchorage, Third Division, Territory of Alaska together with the building thereon situated.

This lien is claimed for labor performed on said premises as a carpenter in the construction of the building now on said premises, and for material furnished and used in said construction.

That the said services were performed during the period beginning May 3, 1948, and ending June 10, 1948, and consisted of 268 hours labor at the agreed wage of \$2.66 per hour, or \$728.12.

That this claimant furnished lumber which was used in the construction of said building to the value of \$202.00, during the period above mentioned.

That there is now due and owing to the claimant for said services and said material furnished after deducting just credits and off-sets the sum of \$914.28.

That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting.

That this claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned and said lumber was furnished at the request of the said Russell W. Smith.

That the said Russell W. Smith had charge of the construction of said building under contract with the above-named Audrey Cutting.

Wherefore, this claimant claims lien upon the afore-described premises for the services rendered and material furnished as aforesaid in the sum of \$914.28.

/s/ A. L. BAXLEY.

Duly verified.

EXHIBIT "C"

EDWARD C. RANKIN,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37 D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimant, Edward C. Rankin, claims a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the Precinct of Anchorage, Third Division, Territory

of Alaska, together with the building thereon situated.

This lien hereby claimed is for labor performed on said premises as a carpenter in the construction of the building now on said premises.

That the said services were performed during the period beginning May 17, 1948, and ending June 12, 1948, and consisted of 186 hours labor at the agreed wage of \$2.66 per hour and there is now due and owing to this claimant for said services, after deducting all just credits and off-sets, the sum of \$494.76. That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting.

That this claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned.

That the said Russell W. Smith had charge of the construction of said building under a contract with the above-named Audrey Cutting.

Wherefore, this claimant claims a lien upon afore-described premises and for services above mentioned in the sum of \$494.76.

/s/ EDWARD RANKIN.

Duly verified.

EXHIBIT "D"

LEE RUNKLE,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37 D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimant, Lee Runkle, claims a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the Precinct of Anchorage, Third Division, Territory of Alaska, together with the building thereon situated.

This lien hereby claimed is for labor performed on said premises as a carpenter in the construction of the building now on said premises.

That said services were performed during the period beginning May 3rd, 1948, and ending June 10th, 1948, and consisted of 276 hours labor at the agreed wage of \$2.66 per hour and there is now due and owing to this claimant for said services,

after deducting all just credits and off-sets, the sum of \$734.15. That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting.

That this claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned.

That the said Russell W. Smith had charge of the construction of said building under a contract with the above-named Audrey Cutting.

Wherefore, this claimant claims a lien upon afore-described premises and for services above mentioned in the sum of \$734.15.

/s/ LEE RUNKLE.

Duly verified.

EXHIBIT "E"

ARDEN BELL,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37 D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimant, Arden Bell, claims a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the Precinct of Anchorage, Third Division, Territory of Alaska, together with the building thereon situated.

This lien hereby claimed is for labor performed on said premises as a carpenter in the construction of the building now on said premises.

That said services were performed during the period beginning May 3, 1948, and ending June 11, 1948, and consisted of 286 hours labor at the agreed wage of \$2.66 per hour and there is now due and owing to this claimant for said services, after deducting all just credits and off-sets, the sum of \$760.76. That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting.

That this claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned.

That the said Russell W. Smith had charge of the construction of said building under a contract with the above-named Audrey Cutting.

Wherefore, this claimant claims a lien upon the afore-described premises and for services above mentioned in the sum of \$760.76.

/s/ ARDEN BELL.

Duly verified.

EXHIBIT "F"

WILLIAM BESSER,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37 D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimant, William Besser, claims a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the Precinct of Anchorage, Third Division, Territory of Alaska, together with the building thereon situated.

This lien is claimed for labor performed on said premises as a laborer in the construction of the building now on said premises.

That the said services were performed during the period beginning May 18th, 1948, and ending May 21st, 1948, and consisted of 32 hours labor at the agreed wage of \$2.00 per hour, and there is now due and owing to the claimant for said services

the sum of Sixty-four Dollars (\$64.00) after deducting all just credits and off-sets.

That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting.

That this claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned; that said Russell W. Smith had charge of the construction of said building under a contract with the said Audrey Cutting.

Wherefore, this claimant claims a lien upon the afore-described premises for the services rendered as aforesaid, in the sum of Sixty-four Dollars (\$64.00).

/s/ WILLIAM BESSER.

Duly verified.

[Endorsed]: Filed July 24, 1948.

[Title of District Court and Cause.]

No. A-5087

APPEARANCE

Comes now Audrey Cutting, the defendant in the above-entitled cause and makes this her appearance in this action.

/s/ AUDREY CUTTING.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1948.

[Title of District Court and Cause.]

No. A-5087

ANSWER

Comes now the defendant, Audrey Cutting, and answering the first cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Admits that she is the owner of that certain real property situate in the City of Anchorage, Alaska, and more particularly described as follows:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska,

but denies that either she or anyone authorized by her as agent employed the plaintiff in any capacity whatsoever to perform services on the subject real property or to any building located thereon.

II.

Denies that the plaintiff has acquired a lien against said real property or any building thereon.

III.

Denies that the sum alleged in paragraph V of plaintiffs' first cause of action, i.e., \$627.76, is now

due and owing from the defendant to the plaintiff.

Answer to Second Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the second cause of action set forth in plaintiff's complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges and adopts as part of her answer to the second cause of action all of the allegations set forth in paragraphs I, II, and III of her answer to the first cause of action.

II.

Denies that the sum alleged in paragraph II of the second cause of action, i.e., \$914.88, is now due and owing from the defendant to the plaintiff.

Answer to Third Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the third cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges, and adopts as part of her answer to the third cause of action all of the allegation set forth in paragraphs I, II, and III of her answer to plaintiffs' first cause of action.

II.

Denies that the sum alleged in paragraph II, i.e., \$494.76, or any other sum, is now due and owing from the defendant to the plaintiff.

Answer to Fourth Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the fourth cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges and adopts as part of her answer to plaintiffs' fourth cause of action all of the allegations set forth in paragraphs I, II, and III of her answer to plaintiffs' first cause of action.

II.

Denies that the sum alleged in paragraph II, i.e., \$734.16, or any other sum, is now due and owing from defendant to the plaintiff.

Answer to Fifth Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the fifth cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges, and adopts as part of her answer to plaintiffs' fifth cause of action all

of the allegations set forth in paragraphs I, II, and III of her answer to the first cause of action.

II.

Denies that the sum of \$760.76 as alleged in paragraph II of the fifth cause of action, or any other sum, is now due and owing from the defendant to the plaintiff.

Answer to Sixth Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the sixth cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges, and adopts as part of her answer to plaintiff's sixth cause of action all of the allegations set forth in paragraphs I, II, and III of her answer to plaintiff's first cause of action.

II.

Denies that the sum of \$64.00 as alleged in paragraph II of the sixth cause of action of the complaint, or any other sum, is now due and owing from the defendant to the plaintiff.

Wherefore, defendant, having fully answered the complaint filed by plaintiffs, prays this Honorable Court to dismiss the same with costs assessed to the plaintiffs.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

United States of America,
Territory of Alaska—ss.

Audrey Cutting, being first duly sworn, deposes and says: That she is one of the defendants named in the above-entitled action; that she has read the foregoing answer, knows the contents thereof, and that the same so far as it relates to her separate answer, is true as she verily believes.

/s/ AUDREY CUTTING.

Subscribed and sworn to before me this 7th day of September, 1948.

/s/ HAROLD J. BUTCHER,
Notary Public in and for
Alaska.

My Commission expires April 23, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed September 9, 1948.

[Title of District Court and Cause.]

No. A-5087

ORDER ALLOWING INTERVENTION

The complaint of Herald E. Stringer having been presented to me, and leave asked to file the same, as his complaint of intervention herein, and it appearing that good cause exists therefore, it is ordered that leave be granted to file the same, and that said

Herald E. Stringer be permitted to intervene in said action.

Dated this 9th day of November, 1948, at Anchorage, Alaska.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered November 9, 1948.

In the District Court for the Territory of Alaska
Third Division

No. A-5087

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKIN, LEE RUNKEL, ARDEN BELL,
and WILLIAM BESSER,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING, and
RUSSEL W. SMITH,

Defendants.

HERALD E. STRINGER, Trustee for the Estate
of Russel W. Smith, Bankrupt,

Intervenor.

COMPLAINT IN INTERVENTION

Comes now Herald E. Stringer, trustee of the estate of Russel W. Smith, bankrupt, one of the

defendants in the above-entitled action, and files his complaint in this action, leave of court being first had, and alleges as follows:

(1) On the 16th day of July, 1948, Russel W. Smith, one of the defendants in this action, filed his voluntary petition in Bankruptcy in this Court and on said day was duly adjudged a bankrupt by said Court according to the provisions of the acts of Congress relating to bankruptcy. On the 16th day of July, 1948, the matter of Russel W. Smith, in bankruptcy, was referred by this Court to Stanley J. McCutcheon, Referee in Bankruptcy of this Court; and on the 12th day of August, 1948, at the first meeting of creditors of said bankrupt, Herald E. Stringer, intervenor herein, was duly appointed trustee of the estate of said bankrupt, and on the same day this appointment was approved by the said Referee; and thereafter Herald E. Stringer, by notice of acceptance in writing filed in said matter, accepted this appointment as trustee. That because of the above premises, Herald E. Stringer, intervenor herein, has an interest in the matter in litigation.

(2) That on the 30th day of April, 1948, Russel W. Smith and Audrey Cutting, defendants in this action, entered into a written contract wherein it was agreed between these parties that Russel W. Smith would erect a building on Lot Two (2) in Block Thirty-seven "D" (37-D) of the South Addition to the City of Anchorage, furnishing materials and supplies to be used in the construction thereof,

and the said Audrey Cutting, in consideration therefor, agreed to pay the said Russel W. Smith for labor, materials, and supplies in the amount of \$10,500.00. That immediately thereafter, Russel W. Smith entered into the performance of said contract and furnished labor, materials, and supplies in the reasonable and agreed value of \$10,500.00, for the benefit of the above-described property, all of which work was done and material and supplies furnished with the knowledge and consent of the owner of said premises and property. That because of the foregoing, there became due and owing to the said Russel W. Smith the sum of \$10,500.00; that the said Audrey Cutting has not paid the sum so due, as aforesaid, to the said Russel W. Smith, or any part thereof, although frequently requested to do so; that because of the premises in paragraph (1) of this complaint in intervention this amount is now due and owing from the said Audrey Cutting to the said Herald E. Stringer, trustee of the estate of the said Russel W. Smith, bankrupt.

(3) That by reason of the premises in paragraph (2) of this complaint in intervention the said Russel W. Smith acquired a lien upon the premises hereinbefore described for the sum due him, as aforesaid, and for the purpose of securing and perfecting his said lien, the said Russel W. Smith on the 12th day of September, 1948, filed for record in the office of the Recorder for the Anchorage Precinct, Territory of Alaska, a claim containing a true statement of his demand, duly verified, after deduct-

ing all just credits and offsets, with the name of the person to whom he had furnished the labor, materials, and supplies, and also a description of the property to be charged with said lien sufficiently identified; that said claim of lien was duly recorded in Book 17, Page 113; that a true and correct copy of said claim of lien is hereunto annexed, marked "Exhibit A" and made a part of this complaint. That the said Russel W. Smith paid for the preparing, filing and recording said claim of lien the sum of \$17.85. That by reason of the premises contained in paragraph (1) of this complaint in intervention, this said claim of lien is part of the estate of the said Russel W. Smith, bankrupt, and has thereby become vested in the trustee of said estate, Herald E. Stringer, intervenor herein.

(4) That the sum of Two Thousand (\$2,000.00) Dollars is a reasonable amount to be allowed by the Court as the fee for the attorney for intervenor in this action.

Wherefore, by reason of the premises foregoing, intervenor prays:

1. That intervenor have and recover from defendant, Audrey Cutting, the sum of \$10,500.00, together with interest at the rate of 6 per cent per annum from the 19th day of June, 1948; together with \$17.85 for the preparation and recording of the claim of lien; together with \$2,000.00 attorney fees.

2. That intervenor have a lien upon said premises, including the building thereon; that all of said real property and the building thereon be sold under order and decree of this Court according to law, and that the proceeds thereof, after satisfaction of claims arising from any valid prior liens, be applied to the payment of the sum found due to intervenor, as aforesaid.

3. That intervenor have such other and further relief as to the Court may seem equitable in the premises.

/s/ HERALD E. STRINGER,
Intervenor.

Duly verified.

EXHIBIT "A"

RUSSEL W. SMITH,

Claimant,

vs.

AUDREY CUTTING.

CLAIM OF LIEN

Notice is hereby given that Russel W. Smith of Anchorage, Alaska, claims a lien upon the following described land, building, structure and property:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof now of record in the office of the United States Commissioner and ex-officio recorder for

the said Anchorage Precinct; together with the frame building situated thereon; and together with the appurtenances.

That the name of the owner of said land and property and the name of the reputed owner is Audrey Cutting.

That said lien is claimed by the above-named claimant under and by virtue of a contract made and entered into between said claimant and Audrey Cutting for constructing a one-story residence upon the lot above mentioned and described, wherein and whereby it was agreed that the claimant was to erect the building above indicated, and to furnish the materials to be used in the building and construction thereof, and to be paid for the labor, materials and supplies in the amount of Ten Thousand and Five Hundred Dollars (\$10,500.00).

That immediately thereafter and on the 20th day of April, 1948, the claimant entered into the performance of the said contract and furnished labor, materials and supplies of the reasonable and agreed value of Ten Thousand and Five Hundred Dollars (\$10,500.00) for the benefit of the above-described property, all of which work was done and material and supplies furnished with the knowledge and consent of the owner of said premises and property. That the last day on which this claimant so worked and labored and so furnished material and supplies as aforesaid under said contract was June 19, 1948, and that ninety (90) days have not elapsed since claimant ceased to work and labor and furnish materials and supplies under said contract.

That there is now due, owing and unpaid to the claimant from the said Audrey Cutting after deducting all just credits and offsets, the sum of Ten Thousand and Five Hundred Dollars (\$10,500.00), together with interest at six per cent (6%) per annum from June 19, 1948.

Wherefore, claimant claims a lien on said above-described land, building, structure and property in the sum of Ten Thousand and Five Hundred Dollars (\$10,500.00), together with interest at six per cent (6%) per annum from June 19, 1948, and for a further sum of Fifteen (\$15.00) Dollars for the preparation of this statement of lien; for the recording fees hereof; and for a further reasonable attorney's fee to be fixed by the Court for the foreclosure of this lien claim.

/s/ RUSSEL W. SMITH,
Claimant.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 9, 1948.

[Title of District Court and Cause.]

No. A-5087

ANSWER TO COMPLAINT
IN INTERVENTION

Comes now Audrey Cutting, one of the defendants above named, and appearing for herself and not

otherwise and in answer to the complaint in intervention of Herald E. Stringer, trustee for the estate of Russel W. Smith, bankrupt, admits and denies as follows:

I.

The defendant, Audrey Cutting, herein answering admits that she entered into a contract with the plaintiff in intervention, the said Russel W. Smith, for the construction of a residence for the total sum of Ten Thousand Five Hundred Dollars (\$10,500.00), but denies that said contract has been completed in accordance with its terms and to the satisfaction of the defendant.

II.

The defendant, answering denies that the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) is now due and owing to the intervenor, and denies all other allegations contained in said complaint in intervention inconsistent with said contract and the performance thereunder.

Wherefore, defendant prays that the complaint of the trustee for the estate of Russel W. Smith, bankrupt, be dismissed with costs to the defendant.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed December 30, 1948.

In the District Court for the Territory of Alaska
Third Judicial Division

No. A-5087

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKIN, LEE RUNKEL, ARDEN BELL,
and WILLIAM BESSER,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING, and
RUSSEL W. SMITH,

Defendants.

No. A-5088

TED VAN THIEL, PATSY VAN THIEL, E. P.
CARTEE, JEAN CARTEE, R. C. REEVE,
and JANICE REEVE, Co-partners Under the
Firm Name and Style of KENNEDY HARD-
WARE, and GENE BRADY, Co-partners Un-
der the Firm Name and Style of BRADY'S
FLOOR COVERING, and E. V. FRITTS,
WILLIAM J. WALLACE and EINER G.
NELSON, Co-partners Under the Firm Name
and Style of ALASKA PAINT & GLASS CO.,

and CITY ELECTRIC OF ANCHORAGE,
INC., a Corporation,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

Nos. A-5087 and A-5088

ARTHUR F. WALDRON and JOSEPH A. CO-
LUMBUS, Co-partners Doing Business Under
the Firm Name and Style of ANCHORAGE
SAND & GRAVEL COMPANY,

Plaintiffs in Intervention,

vs.

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKIN, LEE RUNKLE, ARDEN BELL
and WILLIAM BESSER, TED VAN THIEL,
PATSY VAN THIEL, E. P. CARTEE, JEAN
CARTEE, R. C. REEVE, and JANICE
REEVE, Co-partners Under the Firm Name
and Style of KENNEDY HARDWARE, and
E. V. FRITTS, WILLIAM J. WALLACE and
EINER G. NELSON, Co-partners Under the
Firm Name and Style of ALASKA PAINT &
GLASS CO., and CITY ELECTRIC OF AN-
CHORAGE, INC., a Corporation, RALPH R.
THOMAS, AUDREY CUTTING and RUS-
SELL W. SMITH; SYLVIA A. HENDER-

SON, a Minor; KETCHIKAN SPRUCE MILLS, INC., a Corporation, ALASKAN PLUMBING & HEATING CO., a Corporation, KEN HINCHEY CO., RAY WOLFE, ESTHER WOLFE, ROBERT WOLFE, MARGARET WOLFE and ED WILHOLTH, Co-partners Doing Business Under the Firm Name and Style of WOLFE HARDWARE & FURNITURE,

Defendants in Intervention.

ANSWER TO COMPLAINT IN INTERVENTION

Comes now the defendant, Audrey Cutting, and answering the Complaint in Intervention of the plaintiffs, admits and denies as follows:

I.

Denies all of the allegations in said complaint contained which are inconsistent or vary from the terms of that certain contract entered into with Russell W. Smith, one of the defendants, an independent contractor, and the execution of which contract is hereby admitted.

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that the same be dismissed with costs.

/s/ HAROLD J. BUTCHER,

Attorney for Defendant.

Duly verified.

[Endorsed]: Filed December 30, 1948.

[Title of District Court and Causes.]

No. A-5087, No. A-5088.

Nos. A-5087 and A-5088.

No. A-5088.

No. A-5087.

No. A-5088.

STIPULATION

It is hereby stipulated by and between the parties who have appeared in the above and foregoing entitled actions, by and through their respective attorneys, that said actions, namely, cases numbered A-5087 and A-5088 be consolidated for trial, and that all the material allegations set forth in each of the respective pleadings in said actions, including complaints, complaints in intervention, affirmative answers and counter-claims, be deemed denied by all other parties than the respective pleaders, and said cases be deemed at issue in all respects and ready for trial.

It is further stipulated that A. L. Baxley, plaintiff in Case No. 5087, would testify if present at the trial, to the truth of the allegations set forth in Paragraphs II and III of the second cause of action of the complaint of Ray Bullerdick, et al, Case No. 5087.

/s/ GEORGE B. GRIGSBY,

Attorney for Ray Bullerdick, et al., Case No. A-5087, Brady's Floor Covering, Case No. A-5088, Alaska Paint and Glass Co., Case No. A-5088,

and City Electric of Anchorage, Inc., Case No. A-5088, and Kennedy Hardware, Case No. A-5088.

/s/ J. L. McCARREY, JR.,
Attorney for Anchorage Sand and Gravel Company,
Cases Nos. A-5087 and A-5088.

/s/ WENDELL P. KAY,
Attorney for Ketchikan Spruce Mills, Inc., a Corporation, and Alaskan Plumbing and Heating Company, Inc., a Corporation, Case No. A-5088.

/s/ JOHN H. DIMOND,
Attorney for Trustee for the Estate of Russell W. Smith, Bankrupt, Case No. A-5087.

/s/ HAROLD J. BUTCHER,
Attorney for Audrey Cutting and Sylvia Henderson,
Cases Nos. A-5087 and A-5088.

/s/ EDWARD V. DAVIS,
Attorney for Wolfe Hardware and Furniture, Cases
Nos. A-5087 and A-5088.

[Endorsed]: Filed January 13, 1949.

No. A-5087 and No. A-5088

MINUTE ORDER DENYING MOTION

Now at this time upon motion of George B. Grigsby, counsel for plaintiffs in cause No. A-5087 entitled Ray Bullerdick, A. L. Baxley, Edward C.

Rankin, Lee Runkle, Arden Bell and William Besser, plaintiffs, versus Ralph R. Thomas, Audrey Cutting and Russell W. Smith, defendants and cause No. A-5088, entitled Ted Van Thiel, et al., plaintiffs, versus E. V. Fritts, et al., that above-entitled causes be set for trial at 10:00 o'clock a.m. of Monday, January 31, 1949, and with Harold H. Butcher, counsel for defendant Cutting objecting,

It Is Hereby Ordered that the above motion be, and it is hereby, denied without prejudice.

Entered January 25, 1949.

[Title of District Court and Cause.]

No. 5087

ANSWER AND CROSS-COMPLAINT

Come now Ken Hinchey and Nadine Hinchey, doing business as Ken Hinchey Company, one of the above-named defendants, in answer to the first cause of action of the complaint in intervention of the intervening plaintiffs, and admits, denies and alleges as follows:

I.

Except as hereinafter set forth, defendant Ken Hinchey Company admits the allegations of the first, second, third and fourth paragraphs of the first cause of action of the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners, doing business under the firm name and style of Anchorage Sand & Gravel Company.

II.

Defendant Ken Hinchey Company has no knowledge or information sufficient to form a belief concerning the allegations of the fifth, sixth and seventh paragraphs of the first cause of action of the complaint in intervention above described, and for that reason denies each and all the allegations of such paragraph.

III.

Defendant Ken Hinchey Company has no knowledge or information sufficient to form a belief concerning the allegations of the eighth paragraph of the first cause of action of the complaint in intervention above described, and for that reason denies each and all the allegations of such paragraph except as to the allegation concerning the filing and recording of the lien claim mentioned in said eighth paragraph at book 70, of Precinct Records, on page 358 thereof, which allegation is admitted by the defendant, Ken Hinchey Company.

IV.

Ken Hinchey Company has no knowledge or information concerning the allegations of the ninth and tenth paragraphs of the first cause of action of the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand & Gravel Company and for that reason denies each and all of such allegations.

V.

Ken Hinchey Company denies each and all the

allegations of the 11th paragraph of the first cause of action of the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand and Gravel Company.

By way of answer to the second cause of action of the complaint in intervention of Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand & Gravel Company, Ken Hinchey Company, admits, denies and alleges as follows:

I.

Ken Hinchey Company admits the allegations of the first paragraph of the second cause of action of the complaint in intervention except the allegations concerning an alleged assignment to the plaintiff in intervention from the co-partners doing business as Concrete products Company and as to such allegations, Ken Hinchey Company has no knowledge or information sufficient to form a belief and for that reason denies the same.

II.

Except as hereinafter set forth, Ken Hinchey Company admits the allegations of the second, third, and fourth paragraphs of the second cause of action of the complaint in intervention.

III.

Ken Hinchey Company has no knowledge or information concerning the allegations of the fifth,

sixth and seventh paragraphs of the second cause of action of the complaint in intervention, and for that reason denies each and all the allegations thereof.

IV.

Ken Hinchey Company denies the allegations of the eighth paragraph of the second cause of action of the complaint in intervention except the allegations concerning the filing and recording of the claim of lien mentioned in such paragraph, which are admitted by the defendant, Ken Hinchey Company.

V.

Ken Hinchey Company has no knowledge or information concerning the allegations of the ninth or tenth paragraphs of the second cause of action of the complaint in intervention and for that reason denies each and all of such allegations.

VI.

Ken Hinchey Company denies all the allegations of the 11th paragraph of the second cause of action of the complaint in intervention.

As a further answer to the complaint in intervention, and by way of cross-complaint thereto, answering defendant, Ken Hinchey Company, alleges as follows:

I.

That at all times concerned in this action Ken Hinchey Company has been the trade name used by Ken Hinchey and Nadine Hinchey, co-partners

doing business at Anchorage, Alaska, under that name.

II.

That defendant Ralph R. Thomas is, and at all times mentioned in this answer was, one and the same person as Ralph Russell Thomas.

III.

Sylvia A. Henderson, as the defendant Ken Hinchey Company believes and so alleges the fact to be, is and at all times mentioned in this action has been, a minor.

IV.

That Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, a co-partnership doing business as Kennedy Hardware, and Gene Brady, are and at all times mentioned herein have been, co-partners doing business at Anchorage, Alaska, under the firm name and style of Brady's Floor Covering.

V.

That E. V. Pritts, William J. Wallace and Einer G. Nelson are and at all times concerned in this action have been co-partners doing business at Anchorage, Alaska, under the firm name and style of Alaska Paint and Glass Company.

VI.

That the City Electric of Anchorage, Inc., is and at all times concerned in this action has been a corporation organized and existing under and by virtue of the laws of the Territory of Alaska.

VII.

That Arthur F. Waldron and Joseph A. Columbus, are and at all times concerned in this action have been, co-partners doing business at Anchorage, Alaska, under the firm name and style of Anchorage Sand & Gravel Company.

VIII.

That Arthur F. Waldron, Roger N. Waldron and Jack Harrison are, and at all times mentioned in this answer have been co-partners doing business at Anchorage, Alaska, under the firm name and style of Cinder Concrete Products Company.

IX.

That Ketchikan Spruce Mills, Inc., is, and at all times mentioned in this answer has been, a corporation.

X.

That Alaskan Plumbing and Heating Company, Inc., is and at all times mentioned in this answer has been, a corporation.

XI.

That at all times concerned in this action Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, are and at all times mentioned in this answer have been, co-partners doing business at Anchorage, Alaska, under the firm name and style of Wolfe Hardware and Furniture.

XII.

That at the time Ken Hinchey Company furnished labor and materials as hereinafter set forth, the defendant, Ralph Russell Thomas, was the record owner of certain real property located in the City of Anchorage, Alaska, and more particularly described as follows:

Lot 2, Block Thirty-seven "D" (37-D) of the South Addition to the townsite of Anchorage, Alaska, according to the map and plat of the Welch Subdivision, which map and plat is on file and of record in the office of the United States Commissioner and ex-officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and including certain buildings constructed thereon, as hereinafter more fully set forth.

XIII.

That since Ken Hinchey Company ceased to furnish materials for construction on the above-described property, a Deed has been recorded at Book seventy-one (71) of the City Records of the Anchorage Recording Precinct, at page twenty-one (21) thereof, which purports to have been executed on the 30th day of November, 1946, and which purports to convey the above-described property from Ralph R. Thomas to Sylvia A. Henderson, and that Sylvia A. Henderson is now the record

owner of such property and that such property is the subject of this action.

XIV.

That during all times concerned in this action, Audrey Cutting has been the purported owner of the property which is the subject of this action and that defendant Audrey Cutting has or may have some interest in such property but that the nature of such interest if in fact Audrey Cutting has any interest in the property, is unknown to Ken Hinchey Company.

XV.

That prior to the date upon which Ken Hinchey Company furnished any materials or labor for the construction of the building upon the real property above described, defendants Sylvia A. Henderson or Audrey Cutting or Ralph Russell Thomas, also known as Ralph R. Thomas, or one or more or all of such parties, entered into a contract with the defendant Russell W. Smith, the date and the exact terms of such contract being unknown to the answering defendants. That by the terms of such contract, the defendant Russell W. Smith was engaged as general contractor for the purpose of constructing a dwelling house for the defendants Audrey Cutting or Sylvia A. Henderson or Ralph R. Thomas, also known as Ralph Russell Thomas, or one or more or all of them, upon the real property and premises above described and which is the subject of this action.

XVI.

That on or about the 23rd day of April, 1948, Ken Hinchey Company was engaged by the defendant Russell W. Smith, as general contractor, to furnish certain goods, wares, merchandise and to perform certain labor in connection with the construction of the building upon the above-described real property and that between the 23rd day of April, 1948, and the 25th day of May, 1948, Ken Hinchey Company, at the special instance and request of Russell W. Smith, furnished certain goods, wares and merchandise and performed certain labor in connection with the construction of said building, and that said goods, wares and merchandise were actually used and expended upon, and such labor was actually performed in, the construction of such building.

XVII.

That the goods, wares, merchandise, and labor, furnished and performed by Ken Hinchey Company in the construction of the building upon the property above described, were of the reasonable value of \$680.49 in lawful money of the United States of America.

XVIII.

That no part of the said sum of \$680.49 has been paid, and that there is now due, owing and unpaid to Ken Hinchey Company from the defendant Russell W. Smith and the defendants Audrey Cutting, Sylvia A. Henderson and Ralph Russell Thomas, also known as Ralph R. Thomas, the sum of \$680.48 after deducting all just credits and offsets.

XIX.

That demand has frequently been made by Ken Hinchey Company for payment of the amount due in the sum of \$680.49 as above set forth, but that no payment thereon has been made and that there is now due and owing to Ken Hinchey Company by reason of such goods, wares, merchandise and labor furnished in the construction of the building upon the real estate above described, the sum of \$680.49, together with interest on that sum at the rate of 6% per annum from the 25th day of May, 1948, until paid.

XX.

That the 25th day of May, 1948, was the last day upon which Ken Hinchey Company furnished any materials, or labor for the construction of the building upon the above-described real property.

XXI.

That on the 10th day of August, 1948, and within 90 days after the last date upon which Ken Hinchey Company so furnished any goods, wares and merchandise and performed labor as aforesaid, the said Ken Hinchey Company for the purpose of maintaining, securing and protecting its lien upon the real property above described, duly filed for record and caused to be recorded in the office of the United States Commissioner and Ex-officio Recorder for the Anchorage Recording Precinct, at Anchorage, Alaska, its statement of claim of lien upon and against the above-described premises, and property,

which said lien was duly recorded in Book 69, of the City Records of such Precinct, at page 230. That a copy of such lien is hereto attached as Exhibit and by reference is made a part hereof to the same extent as though set out in full.

XXII.

That six months have not elapsed since the date of recording the statement of claim of lien, of Ken Hinchey Company as aforesaid.

XXIII.

That such claim of lien so recorded was and is duly verified by the oath of Ken Hinchey, one of the partners of the partnership doing business as Ken Hinchey Company, and contains a true statement of the demands and the amount thereof due to the said Ken Hinchey Company after deducting all just credits and offsets, with the name of the person who engaged the said Ken Hinchey Company to furnish the goods, wares and merchandise and materials or labor as aforesaid. That such statement contains a description of the property on which the lien is claimed, sufficient for identification, being the same property heretofore described herein, and sets forth the name of the owner or reputed owner thereof and the dates when Ken Hinchey Company furnished the materials, goods, wares, merchandise and labor, including the last day thereof.

XXIV.

That the plaintiff in this action and each of the defendants therein, have or claim to have some

right, interest, claim, demand or lien in, to or upon the premises and property above described, but that any such right, title, interest, claim, demand or lien is entirely secondary, subordinate and inferior to the lien of the said Ken Hinchey Company as herein set forth.

XXV.

That the sum of \$13.60 is a reasonable sum to be allowed the answering defendant for the preparation and recording of its statement of lien.

XXVI.

That the sum of \$150.00 is a reasonable sum to be allowed to the answering defendant for and as its attorney's fee in this action.

Wherefore, having fully answered the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand & Gravel Company, the defendant Ken Hinchey Company prays for judgment as follows:

1. That the plaintiff's in intervention may take nothing by their complaint in intervention.
2. That the claim of lien filed by the defendant Ken Hinchey Company may be declared to be a first, prior and paramount lien against the real property which is the subject of this action and more particularly described as:

Lot 2, Block Thirty-seven "D" (37-D) of the South Addition to the townsite of Anchor-

age, Alaska, according to the map and plat of the Welch Subdivision which map and plat is on file and of record in the office of the United States Commissioner and Ex-officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and including particularly, that certain dwelling house located thereon.

3. That plaintiff's lien against the premises which are the subject of this action and above described may be foreclosed and that such property may be sold in the manner provided by law and according to the practice of this Court, and from the proceeds of such sale the lien of the defendant Ken Hinchey Company may be paid, together with the costs of preparation and recording of such lien in the amount of \$13.60, together with plaintiff's costs and disbursements in this action incurred, and attorney's fee to be set by the Court.

4. For such other and further relief as to the Court may seem meet and equitable in the premises.

DAVIS & RENFREW,

Attorneys for the Defendant,
Ken Hinchey Company.

By EDWARD V. DAVIS.

Duly verified.

Service acknowledged.

EXHIBIT "K-W"

KEN HINCHEY CO.,

Claimant,

vs.

RALPH RUSSELL THOMAS, RUSSELL W.
SMITH, and AUDREY CUTTING,

Defendant.

CLAIM OF LIEN

Know All Men by These Presents: That Ken Hinchey Co., by virtue of a certain contract heretofore entered into between it and Russell W. Smith, performed labor and furnished materials toward the construction of a certain building in the excavation of a basement and construction of a cesspool, upon certain real property standing of record in the name of Ralph Russell Thomas; said real property, and the property upon which claimant claims a lien hereunder, being more particularly described as:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the Townsite of Anchorage, Alaska, according to the map and plat of the Welch subdivision which map and plat is on file and of record in the office of the United States Commissioner and Ex-Officio Recorder for Anchorage Precinct, at Anchorage, Alaska.

Together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

That the name of the owner or reputed owner, of the real property hereinabove described is Ralph Russell Thomas; that Audrey Cutting claims some right, title or interest therein; that the residence building now on said premises was constructed by the above-named Russell W. Smith under contract with the said Audrey Cutting, with the full knowledge and consent of the said Ralph Russell Thomas, and was under construction during all the times hereinafter mentioned. That as claimants are informed and believe and so allege the fact to be, there are, or may be other persons or parties claiming some right, title or interest to the hereinbefore described property but the name of such persons or parties are unknown to claimant.

That the reasonable price for such materials so furnished and labor so performed by the claimant was and is the sum of Six hundred eight and 49/100 Dollars (\$680.49), in lawful money of the United States of America; that no part of such sum has been paid; and that there is now due, owing and unpaid from the above-named defendants to the claimant the sum of Six Hundred Eighty and 49/100 Dollars, after deducting all just credits and offsets, and that claimant claims a lien upon the above-described real property and buildings in that sum.

That the materials so furnished, and labor so performed, by claimant was furnished and performed at the special instance and request of Russell W. Smith, and that such materials and labor

were actually used and expended upon the property above described in the excavation of a basement, cesspool and ditch, and in the construction of a cesspool, for the use of, and in connection with, the construction of a building upon the above-described property.

That said materials and labor were so expended upon the above-described property between the 23rd day of April, 1948, and the 25th day of May, 1948, and that claimant ceased to furnish materials and labor for use upon said building and property on the 25th day of May, 1948, and that the expenditure thereof was completed on such date, and within ninety days prior to the filing of this Claim of Lien.

KEN HINCHEY CO.,

By /s/ KEN HINCHEY.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 8, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

SECOND AMENDED ANSWER

Come now the defendants, Audrey Cutting and Sylvia A. Henderson, and for their second amended answer, admit, deny, and allege as follows:

I.

Admit all the allegations of all the paragraphs of the original complaints and the complaints in intervention admitted in the original and amended answers.

II.

Denies all the allegations of all the paragraphs of the original complaints and the complaints in intervention denied in the original and amended answers.

Affirmative Defense

I.

That the defendant, Audrey Cutting, entered into a contract with a licensed contractor, one Russell W. Smith, under the terms of which said Russell W. Smith agreed to construct the residence for the sum of Ninety-eight Hundred Dollars (\$9,800.00) and that said contractor personally made, on his own behalf as an independent contractor, all of the contracts for labor and/or materials set forth in the complaint and that the de-

fendant, Audrey Cutting, duly posted lien non-liability notices on the premises and that said defendant Audrey Cutting is neither guardian nor agent for the defendant, Sylvia Henderson.

II.

That the defendant, Sylvia A. Henderson, is a minor child under the age of 18 years and is the sole owner of lot No. 2 of block 37-D as aforementioned and that said defendant, Sylvia A. Henderson, caused to be posted on said lot on or about the 1st day of May, 1948, a notice of non-responsibility for liens.

Wherefore, defendant prays that plaintiffs take nothing by their complaint and intervention and that they be hence dismissed with costs.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed February 14, 1949.

No. A-5087 and No. A-5088.

MINUTE ORDER GRANTING LEAVE TO AMEND ANSWER

Now at this time upon motion of Harold J. Butcher, counsel for defendants,

It Is Ordered that leave be, and it is hereby granted to amend defendants answer in cause No.

A-5087, entitled Ray Bullerdick, et al, plaintiffs, versus Ralph R. Thomas, et al, defendants, and cause No. A-5088, entitled Ted Van Thiel, et al, plaintiffs, versus Ralph R. Thomas, et al, defendants, to allow defendant Audrey Cutting to deny that she is the owner of the subject property in the above-entitled causes.

Entered February 16, 1949.

[Title of District Court and Causes.]

In Case No. A-5087

In Case No. A-5088

In Nos. A-5087 and A-5088

REPLY TO SECOND AMENDED ANSWER OF
DEFENDANTS, AUDREY CUTTING AND
SYLVIA A. HENDERSON.

Come now Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe, and Ed Wilholth, co-partners doing business under the firm name and style of Wolfe Hardware & Furniture, one of the above-named defendants, in reply to defendants' second Amended Answer and admit, deny and allege as follows:

I.

Deny each and every allegation set forth in paragraph I of affirmative defense of defendants' second Amended Answer except the execution of a contract between Audrey Cutting and one Russell Smith, under the terms of which said Russell W. Smith

agreed to construct the residence as set forth in the said contract.

II.

Admit that the defendant, Sylvia A. Henderson, is a minor child under the age of eighteen years as set forth in paragraph II of the affirmative defense of defendants' second Amended Answer and that since the recording of said deed in which Ralph R. Thomas is named as grantor and Sylvia A. Henderson is named as grantee which deed purports to have been executed on the 30th day of November, 1946, and which deed is now recorded in Book 71, of the City Records of the Anchorage Recording Precinct at page 21, and Sylvia A. Henderson is now the record owner of Lot 2 in Block 37-D of the South Addition to the City of Anchorage, Alaska, and deny all and every other allegation contained in said paragraph II.

Wherefore, defendants Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth pray that they be granted the relief as asked in their Answer and Cross Complaint herein previously filed and such other and further relief as to the Court may seem meet and equitable in the premises.

DAVIS & RENFREW,
Attorneys for Wolfe Hard-
ware & Furniture.

By /s/ PAUL F. ROBISON.

Duly verified.

[Endorsed]: Filed February 17, 1949.

[Title of District Court and Causes.]

No. A-5087

No. A-5088.

No. A-5087 and A-5088.

Third Amended Answer

Come now the defendants, Audrey Cutting and Sylvia A. Henderson and for their third amended answer, admit, deny, and allege as follows:

I.

Admit all the allegations of all the paragraphs of the original complaints and the complaints in intervention admitted in the original and amended answers except that paragraph in the original answer numbered I which is hereby specifically denied.

II.

Audrey Cutting, one of the defendants named herein, denies that she is the owner or ever has been the owner or has any interest whatever in lot number 2 of block number 37-D of the South Addition to the City of Anchorage.

III.

Denies all the allegations of all the paragraphs of the original complaints and the complaints in intervention denied in the original and amended answers.

Affirmative Defense

I.

That the defendant, Audrey Cutting, entered into a contract with a licensed contractor, one Russell W. Smith, under the terms of which said Russell W. Smith agreed to construct the residence for the sum of Ninety-five Hundred Dollars (\$9500) and that said contractor personally made, on his own behalf as an independent contractor, all of the contracts for labor and/or materials set forth in the complaint and defendant, Audrey Cutting, duly posted lien non-liability notices on the premises and that said defendant, Audrey Cutting, is neither guardian nor agent for the defendant, Sylvia Henderson.

II.

That the defendant, Sylvia A. Henderson, is a minor child under the age of 18 years and is the sole owner of lot number 2 of block 37-D as aforementioned and that said defendant, Sylvia A. Henderson, caused to be posted on said lot on or about the 1st day of May, 1948, a notice of non-responsibility for liens.

Wherefore, defendant prays that plaintiffs take nothing by their complaints and intervention and that they be hence dismissed with costs.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed February 18, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

No. A-5087 and A-5088.

REPLY

Comes now Ketchikan Spruce Mills, Inc., a Corporation, and Alaskan Plumbing & Heating Co., a Corporation, and for reply to the affirmative defense of the defendants, Audrey Cutting and Sylvia A. Henderson, answer, admit, deny and allege as follows:

Intervenors admit that the defendant, Audrey Cutting, entered into a contract with Russell W. Smith to construct a residence on Lot Two (2), Block Thirty-seven "D" (37-D) of the South Addition to the City of Anchorage, that Sylvia A. Henderson is a minor child; and that the said Sylvia A. Henderson is now the record owner of title to the above-described premises by deed from Ralph R. Thomas recorded August 4, 1948.

Intervenors deny each and every allegation contained in the said affirmative defense, other than the allegations specifically admitted herein.

Wherefore, intervenors pray for judgment according to the prayer of their complaint.

/s/ WENDELL P. KAY,
Attorney for Intervenors, Ketchikan Spruce Mills,
Inc., and Alaskan Plumbing & Heating Co.

Duly verified—Lyle E. Anderson for Ketchikan Spruce Mills, Inc.

Duly verified—Leo J. Haldiman for Alaskan Plumbing and Heating Co.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

No. A-5088.

No. A-5087.

No. A-5088.

REPLY TO THIRD AMENDED ANSWER OF
AUDREY CUTTING AND SYLVIA HENDERSON.

Come now Ray Bullerdick et al, plaintiffs in case No. A-5087, Ted Van Thiel et al, Co-partners as Brady's Floor Covering, plaintiffs in Case No. A-5088, E. V. Fritts et al, Co-partners as Alaska Paint and Glass Co., plaintiffs in case No. A-5088, City Electric of Anchorage, Inc., a corporation, plaintiff in case No. A-5088, and Ted Van Thiel et al, Co-partners as Kennedy Hardware, Interveners in case No. 5088, and replying to the Third

Amended Answer of defendants Audrey Cutting and Sylvia Henderson, admit, deny and allege as follows:

I.

Replying to Paragraph I of the Affirmative Defense set forth in said answer, deny each and every allegation therein contained, except that allegation that the defendant, Audrey Cutting, entered into a contract with a licensed contractor, one Russell W. Smith, under the terms of which said Russell W. Smith agreed to construct the residence for the sum of Ninety-eight Hundred Dollars (\$9800.00) and that said contractor personally made, on his own behalf as an independent contractor, all of the contracts for labor and/or materials set forth in the complaints of the plaintiffs and intervenor above named.

II.

Replying to Paragraph II of said Affirmative Defense set forth in said answer, deny each and every allegation therein contained, except that plaintiffs admit that the defendant Sylvia Henderson, is a minor, under the age of 18 years and of the age of about 17 years, and is and has been since August 4th, 1949, the record owner of Lot 2 of Block 37-D, and in that behalf plaintiffs allege that said ownership is inferior and subordinate to the claims of lien of the aforesaid plaintiffs and plaintiff in intervention, described and set forth in their respective complaints herein filed.

Wherefore Plaintiffs Pray for Judgment As prayed for in their respective complaints.

/s/ GEORGE B. GRIGSBY,
Attorney for above-named Plaintiffs and Inter-
venors.

A true copy.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

REPLY

Comes now one of the plaintiffs in intervention, Arthur F. Waldron and Joseph A. Columbus, Co-partners doing business under the firm name and style of Anchorage Sand and Gravel Company, and in reply to the Third Amended Answer and Affirmative Defense of Audrey Cutting and Sylvia Henderson, and admits, denies and alleges as follows:

I.

The plaintiff in intervention, Anchorage Sand and Gravel Company, admits that Audrey Cutting

entered into a contract with Russell W. Smith as contractor under the terms of which Russell W. Smith agreed to construct a residence, but states that the contract was for the sum of Nine Thousand Eight Hundred (\$9,800.00) Dollars, and not Nine Thousand Five Hundred (\$9,500.00) Dollars as alleged in paragraph I of the defendant's Third Amended Answer.

In further answer to paragraph I of the Affirmative Defense and defendant's Third Amended Answer, plaintiff in intervention denies that said contractor personally made, on his own behalf as an independent contractor, all of the contracts for labor and/or materials set forth in the complaint; plaintiff in intervention denies that Audrey Cutting duly posted lien non-liability notices of that said defendant.

In further answer to paragraph I of the Affirmative Defense of defendant's Third Amended Answer, plaintiff in intervention denies that Audrey Cutting is neither guardian nor agent for the defendant, Sylvia Henderson.

II.

In answer to paragraph II of the Affirmative Defense of defendant's Third Amended Answer, the Anchorage Sand and Gravel Company, plaintiff in intervention, admits that Sylvia Henderson is a minor child under the age of eighteen years, but denies that Sylvia Henderson is the sole owner of Lot 2, Block 37-D; denies that said defendant,

Sylvia Henderson caused to be posted on said lot, on or about the 1st day of May, 1948, a notice of non-responsibility for liens.

Wherefore, plaintiff in intervention, Anchorage Sand and Gravel Company, prays that defendants Audrey Cutting and Sylvia Henderson, take nothing by their Affirmative Defense and that the plaintiff in intervention have judgment against the defendants as asked for in the complaint.

ANCHORAGE SAND AND
GRAVEL COMPANY,

By /s/ ARTHUR F. WALDRON,
Co-partner.

Plaintiff in Intervention.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff in Inter-
vention.

Duly verified—Arthur F. Waldron.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

REPLY

Comes now intervenor, Herald E. Stringer, trustee for the estate of Russel W. Smith, bankrupt, and replies to the Third Amended Answer of Defendant Audrey Cutting on file herein as follows:

I.

Denies the allegation contained in paragraph I of the Affirmative Defense that the sum for which the residence was to be constructed was \$9,500.00, and alleges that said sum was in an amount of \$10,500.00.

II.

States that he has no knowledge, information or belief sufficient to enable him to answer the allegations contained in the last five lines of Paragraph I of the Affirmative Defense, and therefore denies the same.

III.

States that he has no knowledge, information or belief sufficient to enable him to answer the allegations contained in Paragraph II of the Affirmative Defense, and therefore denies the same.

Wherefore, intervenor prays judgment against

the defendant, Audrey Cutting, as asked for in his complaint in intervention.

/s/ JOHN H. DIMOND,
Attorney for Intervenor, Herald E. Stringer, trustee for estate of Rusel W. Smith, Bankrupt.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 24, 1949.

[Title of District Court and Causes.]

No. A-5087 and A-5088.

**DEFENDANTS' OBJECTIONS TO FINDINGS
OF FACT AND CONCLUSIONS OF LAW
AND JUDGMENT AS PROPOSED BY
PLAINTIFFS**

Comes now the defendant, Audrey Cutting, by and through her attorney, Harold J. Butcher, and objects to the proposed Findings of Fact and Conclusions of Law and Judgment in the above case on the following grounds:

Findings of Fact and Conclusions of Law, which under our code, are essential to judgment in non-jury cases must be found and determined in accordance with well established principles of law, one of which we quote as follows:

“Findings are clearly improper when made in favor of a party who, having the burden of proof

upon an issue, offers no evidence relative thereto.”

This quotation is made from Bancrofts Code Practice and Remedies, Volume II, Section 1692, Page 2173, and the same section in Volume III of Bancrofts Supplement, page 2219, reads as follows:

“But a finding contrary to uncontradicted evidence is not authorized.”

These rules of law are supported by the cases of *Rudneck v. Southern California Metal Company*, 193 Pac. 775, *In re Rasmussen* 205 Pac. 72, and *Watkins v. Glass*, 89 Pac. 840 and *Richards v. Jarvis*, 258 Pac. 317.

It is defendant's contention that paragraph XXIX, page 7, of the proposed Findings of Fact and Conclusions of Law not only is not supported by the evidence, but that the plaintiffs, on whom rested the burden of proving that there was no delivery of the deed, offered no evidence whatever on the subject and that the only evidence offered was by the defendant, Audrey Cutting, and by the introduction of the deed itself and the copy of the mortgage into evidence, together with the mortgage note.

Disregarding all oral testimony of the witness Audrey Cutting, and concerning ourselves with the deed alone, we find that the deed itself creates a legal presumption of delivery as of the date of its making. This rule is clearly stated on page 84 of the last edition of *Jones on Evidence Civil Cases*, Volume 1, Section 50, and which reads as follows;

“So where a deed is duly signed, attested and witnessed, there arises a presumption of sealing and delivery and the time of its execution and delivery is presumed to be on the day of its date.”

This rule of law is amply supported by ruling cases and by other text writers on the subject, “Presumptions in Evidence.” Therefore, by the deed alone, there was created a presumption of delivery in the defendant, Sylvia Henderson, which until rebutted by evidence that no delivery occurred, was controlling. The writer has been unable to find any case whatever which indicates that the act of recording is any evidence of the act of delivery under such circumstances.

The presumption of delivery by virtue of the deed placed the burden of proving non-delivery of the deed on the plaintiffs.

The un rebutted presumption of delivery of the deed to the defendant, Sylvia Henderson, standing alone would prevent a finding as set forth in paragraph XXIX of the proposed findings, however, the presumption of delivery does not stand alone. It is supplemented by the uncontradicted testimony of Audrey Cutting and the further proof, also uncontradicted, of the making of the mortgage and its signing by Sylvia Henderson together with the mortgage note. There is, therefore, no basis for the finding of delivery on August 4, 1948, as set forth in paragraph XXIX and no basis in law by which the court could find otherwise than in accordance with the uncontradicted proof of the defendant.

Therefore, it is requested that the finding that there was no delivery of the deed until after construction of the buildings be struck from the Findings of Fact and the Judgment.

Respectfully submitted,

/s/ HAROLD J. BUTCHER,

Attorney for the Defendant.

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088

No. A-5088.

No. A-5087.

No. A-5088.

No. A-5087.

No. A-5087.

No. A-5088.

Findings of Fact and Conclusions of Law

The above-entitled causes No. A-5087 and A-5088, having been consolidated for trial by order of the Court, pursuant to Stipulation of all the parties, plaintiffs, defendants and intervenors, came on for

trial before the Court without a jury on the 8th day of February, 1949; the trial proceeded thereafter on the 8th, 9th and 10th, 14th, 15th and 16th of February, 1949, and was concluded on the latter date.

Ray Bullerdick, et al, plaintiffs in Cause No. A-5087, Ted Van Thiel, et al, co-partners as Brady's Floor Covering, E. V. Fritts, et al, co-partners as Alaska Paint and Glass Company, and City Electric of Anchorage, Inc., a corporation, plaintiffs in cause No. A-5088 and the intervenors, Ted Van Thiel, et al, co-partners as Kennedy Hardware, appeared in person and by their attorney, George B. Grigsby.

The intervenors, Arthur F. Waldron, et al, co-partners as Anchorage Sand and Gravel Company, appeared in person and by their attorney, J. L. McCarrey, Jr.

The intervenors, Ketchikan Spruce Mills, Inc., a corporation, and Alaskan Plumbing and Heating Company, Inc., a corporation, appeared by their attorney, Wendell P. Kay.

The intervenor, Herald E. Stringer, Trustee for the Estate of Russell W. Smith, bankrupt, appeared in person.

The intervenors, Ken Hinchey and Nadine Hinchey, co-partners, as Ken Hinchey Company, appeared in person and by their attorneys Edward V. Davis and Paul F. Robison.

The intervenors, Ray Wolfe, Esther Wolfe, et al, co-partners as Wolfe Hardware and Furniture,

appeared in person and by their attorneys, Edward V. Davis and Paul F. Robison.

The defendants, Audrey Cutting and Sylvia A. Henderson, a minor, appeared by their attorney, Harold J. Butcher.

No appearance was made by the defendant, Ralph R. Thomas in person or by attorney.

Witnesses were sworn and testified and documentary evidence was introduced on behalf of plaintiffs, intervenors and defendants, and thereafter argument of respective counsel was heard and considered; thereafter, on March 4, 1949, the Court having heard the testimony and being fully advised in the premises, rendered its oral opinion on the claims of the several parties and directed that Findings of Fact and Conclusions of Law be prepared and submitted in accordance therewith, and now the Court makes its Findings of Fact and Conclusions of Law, as follows:

I.

That the plaintiffs Ted Van Thiel, et al., and Gene Brady were at all times herein mentioned and now are, co-partners doing business under the firm name and style of Brady's Floor Covering.

II.

That the plaintiffs, E. V. Fritts, et al., were and at all times herein mentioned and now are, co-partners, doing business under the firm name and style of Alaska Paint and Glass Company.

III.

That the City Electric of Anchorage, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska and has paid its annual license tax for the year 1948 and filed its annual Financial Statement due March 1, 1948.

IV.

That the intervenors, Arthur F. Waldron and Joseph A. Columbus, were at all times hereinafter mentioned and now are co-partners doing business under the firm name and style of Anchorage Sand and Gravel Company.

V.

That the intervenors, Ketchikan Spruce Mills, Inc., and Alaskan Plumbing and Heating Company, Inc., were at all times hereinafter mentioned and now are corporations organized and existing under and by virtue of the laws of the Territory of Alaska and have respectively filed their annual license tax for the year 1948 and have filed their annual Financial Statement due March 1, 1948.

VI.

That the intervenor, Herald E. Stringer, Trustee, in the Matter of the Estate of Russell W. Smith, Bankrupt, is the duly appointed, qualified and acting Trustee for the Estate of Russell W. Smith, bankrupt.

VII.

That the intervenors, Ted Van Thiel, et al., were

at all times hereinafter mentioned and now are co-partners doing business under the firm name and style of Kennedy Hardware.

VIII.

That the intervenors, Ken Hinchey and Nadine Hinchey, were at all times hereinafter mentioned and now are co-partners doing business under the firm name and style of Ken Hinchey Company.

IX.

That the intervenors, Ray Wolfe, et al., were at all times hereinafter mentioned and now are co-partners doing business under the firm name and style of Wolfe Hardware and Furniture.

X.

That at all times hereinafter mentioned and until the 4th day of August, 1948, the defendant, Ralph R. Thomas, was the owner of record, and the defendant, Audrey Cutting, was the reputed owner of that certain real property situate in the City of Anchorage, Alaska, particularly described as follows, to wit:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file and of record in the office of the United States Commissioner and Ex-officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with the residence building situated thereon.

XI.

That during the period from April 3, 1948, and June 23, 1948, the defendant, Russell W. Smith, was engaged in and completed the construction of a residence building on the premises hereinbefore described under a contract with the defendant, Audrey Cutting, which said contract was on the 30th day of April, 1948, reduced to writing and by the terms of which the said Audrey Cutting agreed to pay the said Russell W. Smith the sum of Nine Thousand Eight Hundred Dollars (\$9,800.00) for said construction.

That the said construction was with the knowledge, consent and at the instance of the defendant, Ralph R. Thomas.

XII.

That during the aforesaid period the above-named plaintiffs and intervenors performed labor and furnished materials in the construction of said residence building at the request of the said Russell W. Smith for which the said Russell W. Smith promised and agreed to pay, except in the instances hereinafter stated.

XIII.

That the plaintiff, Ray Bullerdick, during the period between May 15, 1948, and June 15, 1948, performed labor on the construction of said building as a carpenter, of the reasonable value and at the agreed compensation of \$627.76.

XIV.

That the plaintiff, A. L. Baxley, during the period from May 3, 1948, and June 10, 1948, performed labor as a carpenter, on said building and furnished material used in the construction thereof, at the agreed price and reasonable value of \$914.88.

XV.

That the plaintiff, Edward C. Rankin, during the period from May 17, 1948, and June 12, 1948, performed labor as a carpenter on the construction of said building, of the reasonable value and at the agreed compensation of \$494.76.

XVI.

That the plaintiff, Lee Runkle, during the period from May 3, 1948, and June 10, 1948, performed labor as a carpenter on the construction of said building of the reasonable value and at the agreed compensation of \$734.16.

XVII.

That the plaintiff, Arden Bell, during the period from May 3, 1948, to June 11, 1948, performed labor as a carpenter on the construction of said building of the reasonable value and at the agreed compensation of \$760.76.

XVIII.

That the plaintiff, William Besser, during the period from May 18, 1948, and May 21, 1948, performed labor as a laborer on the construction of said building of the reasonable value and at the agreed compensation of \$64.00.

XIX.

That the plaintiff, Brady's Floor Covering, during the period June 2, 1948, to June 18, 1948, performed labor and furnished material in the construction of said building of the reasonable value of \$474.41.

XX.

That the plaintiff, Alaska Paint and Glass Company, during the period from June 1, 1948, to June 31, 1948, performed labor and furnished material in the construction of said building of the reasonable value of \$700.00.

XXI.

That City Electric of Anchorage, Inc., during the period between April 28, 1948, and June 23, 1948, performed labor and furnished material in the construction of said building of the reasonable value of \$473.99.

XXII.

That the intervenor, Anchorage Sand and Gravel Company, during the period between May 5, 1948, and May 29, 1948, performed labor and furnished material in the construction of said building of the reasonable value of \$377.61, that the said labor and material was performed and furnished at the request of the defendant, Audrey Cutting, for which she promised and agreed to pay.

That during the period between May 10, 1948, and May 18, 1948, Arthur F. Waldron, Roger N. Waldron and Jack Harrison were co-partners doing business as Cinder Concrete Products Company and

as such co-partners furnished material in the construction of said building at the request of the said defendant, Russell W. Smith, and for which the said Russell W. Smith promised and agreed to pay the reasonable value therefor of \$628.27.

That thereafter, the said Cinder Concrete Products Company, assigned its said claim against the said Russell W. Smith to the intervenor, Anchorage Sand and Gravel Comapny, and at the time of the trial of this action the said Anchorage Sand and Gravel Company was the owner of said claim.

XXIII.

The the intervenor, Ketchikan Spruce Mills, Inc., during the period between May 3, 1948, and June 9, 1948, furnished material for the construction of said building of the reasonable value of \$2,717.86, that said material was furnished at the request of the defendant, Audrey Cutting, for which she promised and agreed to pay.

XXIV.

That the Alaskan Plumbing and Heating Company, during the period from May 21, 1948, to June 18, 1948, performed labor and furnished material in the construction of said building of the reasonable value of \$1,685.00.

XXV.

That intervenor, Kennedy Hardware, during the period from May 20, 1948, to June 19, 1948, furnished material for the construction of said building of the reasonable value of \$112.95.

XXVI.

That intervenor, Ken Hinchey Company, during the period April 23, 1948, to May 25, 1948, performed labor and furnished material in the construction of a cesspool on the premises on which said building was situated, the reasonable value of which is \$680.49.

XXVII.

That intervenor, Wolfe Hardware and Furniture, during the period May 3, 1948, to June 10, 1948, furnished material for the construction of said building of the reasonable value of \$199.80.

XXVIII.

That none of the plaintiffs or intervenors who furnished labor or material in the construction of the said residence building have been paid any part of the sums respectively due them for the said labor or material and the said amounts as hereinbefore stated are, all and the whole thereof, due, owing and unpaid.

XXIX.

That the defendant, Ralph R. Thomas, on the 20th day of November, 1946, executed a deed conveying the premises hereinbefore described to the defendant, Sylvia A. Henderson, a minor, and thereafter, after the completion of the construction of the building on the premises hereinbefore described, the same was delivered to the said Sylvia A. Henderson and was thereafter, on the 4th day of August, 1948, recorded in the office of the Recorder for the An-

chorage Recording Precinct, Third Division, Territory of Alaska.

XXX.

That by reason of the premises the aforesaid, plaintiffs and intervenors, respectively, and Cinder Concrete Products Company, acquired liens upon the premises hereinbefore described for the sums respectively due them as hereinbefore set forth, and each of said plaintiffs and intervenors thereafter, and within the time allowed by law for the purpose of securing and perfecting their said liens, did each file for record in the Office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of his demand, duly verified, after deducting all just credits and offsets, with the name of the owner and reputed owner of the premises on which lien was claimed, and also the name of the person to whom was furnished the material and labor and also a description of the property to be charged with said lien sufficient for identification; that said claims of lien were duly recorded in the City Records of said Recording Precinct in a book kept by said Recorder for said purpose.

That said plaintiffs, intervenors and the Cinder Concrete Products Company, respectively, paid for filing and recording their said liens, as follows:

Plaintiffs, Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkel, Arden Bell and William Besser, each the sum of \$2.55.

Brady's Floor Covering, the sum of \$4.05.

Alaska Paint and Glass Company, the sum of \$3.40.

City Electric of Anchorage, Inc., the sum of \$2.85.

The Anchorage Sand and Gravel Company and the Cinder Concrete Products Company, each the sum of \$2.50.

The Ketchikan Spruce Mills, Inc., and Alaska Plumbing and Heating Company, Inc., each the sum of \$2.25.

Kennedy Hardware, the sum of \$4.05.

Ken Hinchey Company and Wolfe Hardware and Furniture, each the sum of \$3.60.

XXXI.

That the defendant, Russell W. Smith, acquired a lien on the premises hereinbefore described by reason of the performance of his contract with the defendant, Audrey Cutting, and for services in addition thereto in the sum of \$10,000.00.

That the said Russell W. Smith was, on the 16th day of July, 1948, in certain proceedings held in the above entitled Court, duly adjudged a bankrupt and said bankruptcy proceedings are still pending.

XXXII.

That the defendant, Sylvia A. Henderson, is the owner of the premises described herein by virtue of a deed of conveyance thereof from the defendant, Ralph R. Thomas, dated November 30, 1946, and recorded August 4, 1948, but that the interest of the said Sylvia Henderson, a minor, in said premises, is inferior and subordinate to the liens of the plain-

tiffs and intervenors herein set forth and described.

XXXIII.

That none of the plaintiffs and intervenors heretofore named who performed labor or furnished material in the construction of the building on the premises hereinbefore described had any knowledge or notice of the execution of said deed from the said Ralph R. Thomas to the said Sylvia A. Henderson or any notice that the said Sylvia A. Henderson claimed any interest in said premises until long after the completion of the construction of said building.

XXXIV.

That neither the defendant, Ralph R. Thomas, Sylvia A. Henderson, a minor, or the defendant, Audrey Cutting, within three days after the construction of said building was commenced upon the premises hereinbefore described, posted any notice or notices upon said premises to the effect that they or either of them, would not be responsible for the payment of any claims for labor or material incurred in the said construction.

From the foregoing facts, the Court deduces Conclusions of Law as follows:

Conclusions of Law

I.

That there became due and owing to each of the plaintiffs and intervenors, save to the intervenors, Anchorage Sand and Gravel Company and Ketchi-

kan Spruce Mills, Inc., from the defendant, Russell W. Smith, for the labor and material performed and furnished respectively by each of them, the sums hereinbefore set forth as the agreed price and reasonable value thereof, together with interest allowed by law, but that no personal judgment can be rendered on any of said claims against the said Russell W. Smith, by reason of his having been adjudged a bankrupt prior to the commencement of the above entitled actions.

II.

That there is due and owing to the intervenors, Anchorage Sand and Gravel Company and to the Ketchikan Spruce Mills, Inc., from the defendant, Audrey Cutting, the sums respectively due each of them for labor performed and material furnished as hereinbefore set forth as the agreed price and reasonable value thereof, together with interest as allowed by law, costs and disbursements, including attorney fees, and said intervenors are entitled to a personal judgment for said amounts against the defendant, Audrey Cutting.

III.

That the plaintiffs and intervenors heretofore named, respectively, have liens upon the premises hereinbefore described and the residence building constructed thereon as aforesaid, for the sums respectively found due them as aforesaid, with interest as allowed by law, together with costs and disbursements, including attorney's fees, as follows, to wit:

Plaintiffs in Cause No. A-5087

Ray Bullerdick, for the sum of \$627.77 with interest at 6% per annum from June 15, 1948, plus the sum of \$2.55 for filing and recording claim of lien.

A. L. Baxley, for the sum of \$914.88 with interest at 6% per annum from June 10, 1948, plus the sum of \$2.55 for filing and recording claim of lien.

Edward C. Rankin, for the sum of \$494.76, with interest at 6% per annum from June 12, 1948, plus the sum of \$2.55 for filing and recording claim of lien.

Lee Runkle, for the sum of \$734.16, with interest at 6% per annum from June 10, 1948, plus the sum of \$2.55 for filing and recording claim of lien.

Arden Bell, for the sum of \$760.76, with interest at 6% per annum from June 11, 1948, plus the sum of \$2.55 for filing and recording claim of lien.

William Besser, for the sum of \$64.00, with interest at 6% per annum from May 21, 1948, plus the sum of \$2.55 for filing and recording claim of lien.

The above-named plaintiffs, jointly, for the sum of \$750.00 as reasonable attorney's fees for the prosecution of said action, together with their costs of suit.

Plaintiffs in A-5088

Brady's Floor Covering, for the sum of \$474.41, with interest at 6% per annum from June 8, 1948, plus the sum of \$4.05 for filing and recording claim of lien.

Alaska Paint and Glass Co. for the sum of \$700.00,

with interest at 6% per annum from June 21, 1948, plus the sum of \$3.40 for filing and recording claim of lien.

City Electric of Anchorage, Inc., for the sum of \$473.99, with interest at 6% per annum from June 23, 1948, plus the sum of \$2.85 for filing and recording claim of lien.

The above named plaintiffs in A-5088 jointly, for the sum of \$350.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit.

Intervenors

Anchorage Sand and Gravel Company, for the sum of \$377.61 on their first cause of action, with interest at 6% per annum from May 29, 1948, plus the sum of \$2.50 for filing and recording claim of lien, and for the sum of \$628.27 on their second cause of action, with interest at 6% per annum from May 18, 1948, plus the sum of \$2.50 for filing and recording claim of lien, and for the sum of \$300.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit.

Ketchikan Spruce Mills, Inc., for the sum of \$2,717.86, with interest at 6% per annum from June 9, 1948, plus the sum of \$2.25 for filing and recording claim of lien; and Alaskan Plumbing and Heating Company, Inc., for the sum of \$1,685.00 with interest at 6% per annum from June 18, 1948, plus the sum of \$2.25 for filing and recording claim of lien; and said intervenors, jointly, for the sum of \$700.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit.

Kennedy Hardware, for the sum of \$112.95, with interest at 6% per annum from June 19, 1948, plus the sum of \$4.05 for filing and recording claim of lien and for the sum of \$50.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit.

Ken Hinchey Company, for the sum of \$680.49, with interest at 6% per annum from May 25, 1948, plus the sum of \$3.60 for filing and recording claim of lien, and for the sum of \$200.00 as reasonable attorney's fees for the prosecution of this action, together with costs of suit.

Wolfe Hardware and Furniture, for the sum of \$199.80, with interest at 6% per annum from June 10, 1948, plus the sum of \$3.60 for filing and recording claim of lien, and for the sum of \$100.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit.

IV.

Intervenor, Herald E. Stringer, Trustee for the Estate of Russell W. Smith, Bankrupt, is not entitled to judgment upon the lien described in his complaint in intervention.

V.

That the plaintiffs and intervenors, aforesaid, except the said Herald E. Stringer, Trustee for the Estate of Russell W. Smith, Bankrupt, are entitled to a decree establishing their respective liens upon the premises and residence building hereinbefore described, for each and all of said sums respectively

due each of them as aforesaid, and also decreeing that the whole of said premises is required for the convenient use and occupation of the residence building thereon; and further decreeing that all and singular the said premises mentioned and described herein be hold at public auction by the United States Marshal for the Third Division, Territory of Alaska, in the manner provided by law, for the sale of real estate on execution, and that the plaintiffs and intervenors aforesaid to whom judgments for their respective liens have been awarded, or any of the parties to the aforesaid actions may become purchasers at such sale; and further decreeing that said Marshal, out of the proceeds of said sale retain his fees, disbursements, and commissions, if any, and from the balance pay to the plaintiffs and intervenors, respectively, or their respective attorneys, the amount of their respective liens, including costs, disbursements and attorney's fees, with interest at the rate of 6% per annum from the date of said decree; and that if the proceeds of said sale be insufficient to pay said lien-holders in full, after deducting said Marshal's fees, costs, disbursements and commissions, the same shall be applied pro rata to the payment of their respective liens; and that any balance remaining in the hands of said Marshal after deducting his said fees, costs, disbursements and commissions, and after paying of the amounts due said respective lien-holders, shall be paid to the defendant, Sylvia A. Henderson, a minor; and said decree shall further provide that upon such sale

being made the said Marshal shall give the purchaser or purchasers a Certificate of Sale as provided by law, and that the said purchaser or purchasers at said sale be let into the possession of said premises, and that any of the parties to this action who may be in possession of said premises, and any person who since the commencement of the aforesaid actions has come into possession under them or either of them deliver possession thereof to such purchaser or purchasers, on production of said Marshal's Certificate of Sale of said premises.

And Judgment and Decree is hereby ordered to be entered accordingly.

Dated at Anchorage, Alaska, this 8th day of March, 1949.

/s/ ANTHONY J. DIMOND.

Receipt of a copy acknowledged.

In the District Court for the Territory of Alaska
Third Division
No. A-5087

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKIN, LEE RUNKLE, ARDEN BELL
and WILLIAM BESSER,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

No. A-5088

TED VAN THIEL, PATSY VAN THIEL, E. P. CARTEE, JEAN CARTEE, R. C. REEVE and JANICE REEVE, Co-partners under the firm name and style of KENNEDY HARDWARE, and GENE BRADY, Co-partners under the firm name and style of BRADY'S FLOOR COVERING, and E. V. FRITTS, WILLIAM J. WALLACE, and EINER G. NELSON, Co-partners under the firm name and style of ALASKA PAINT AND GLASS CO., and CITY ELECTRIC OF ANCHORAGE, INC., a corporation,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

Nos. A-5087 and A-5088

ARTHUR F. WALDRON and JOSEPH A. COLUMBUS, Co-partners doing business under the firm name and style of ANCHORAGE SAND AND GRAVEL COMPANY,

Plaintiffs in Intervention,

vs.

RAY BULLERDICK et al, and TED VAN THIEL, et al, Co-partners as KENNEDY HARDWARE, and GENE BRADY, Co-part-

ners as BRADY'S FLOOR COVERING, and E. V. FRITTS et al, Co-partners as ALASKA PAINT AND GLASS CO., and CITY ELECTRIC OF ANCHORAGE, Inc., a corporation, and RALPH R. THOMAS, AUDREY CUTTING and RUSSELL SMITH: SYLVIA A. HENDERSON, a minor; KETCHIKAN SPRUCE MILLS, INC., a corporation; ALASKAN PLUMBING AND HEATING COMPANY, INC., a corporation; KEN HINCHEY CO., RAY WOLFE, ESTHER WOLFE, ROBERT WOLFE, MARGARET WOLFE and ED WILHOLTH, Co-partners doing business under the firm name and style of WOLFE HARDWARE AND FURNITURE,

Defendants in Intervention.

No. A-5088

KETCHIKAN SPRUCE MILLS, INC., a corporation, and ALASKAN PLUMBING AND HEATING COMPANY, INC., a corporation,
Plaintiffs in Intervention.

No. A-5087

HERALD E. STRINGER, Trustee for the estate of RUSSELL W. SMITH, Bankrupt,
Intervenor.

No. A-5088

TED VAN THIEL, PATSY VAN THIEL, et al,
Co-partners under the firm name and style of
KENNEDY HARDWARE,
Plaintiffs in Intervention.

No. A-5087

KEN HINCHEY and NADINE HINCHEY, Co-
partners, doing business as KEN HINCHEY
COMPANY,
Defendants in Intervention.

No. A-5087, No. A-5088

RAY WOLFE, ESTHER WOLFE, ROBERT
WOLFE, MARGARET WOLFE and ED
WILHOLTH, Co-partners doing business as
WOLFE HARDWARE AND FURNITURE,
Defendants in Intervention.

JUDGMENT AND DECREE

The above entitled causes No. A-5087 and A-5088, having been consolidated for trial by order of the Court, pursuant to Stipulation of all the parties, plaintiffs, defendants and intervenors, came on for trial before the Court without a jury on the 8th day of February, 1949; the trial proceeded thereafter on the 8th, 9th and 10th, 14th, 15th and 16th of February, 1949, and was concluded on the latter date.

Ray Bullerdick, et al, plaintiffs in Cause No. A-5087, Ted Van Thiel, et al, co-partners as Brady's

Floor Covering, E. V. Fritts, et al, co-partners as Alaska Paint and Glass Company, and City Electric of Anchorage, Inc., a corporation, plaintiffs in case No. A-5088, and the intervenors, Ted Van Thiel, et al, co-partners as Kennedy Hardware, appeared in person and by their attorney, George B. Grigsby.

The intervenors, Arthur F. Waldron, et al, co-partners as Anchorage Sand and Gravel Company, appeared in person and by their attorney, J. L. McCarrey, Jr.

The intervenors, Ketchikan Spruce Mills, Inc., a corporation, and Alaskan Plumbing and Heating Company, Inc., a corporation, appeared by their attorney, Wendell P. Kay.

The intervenor, Herald E. Stringer, Trustee for the Estate of Russell W. Smith, bankrupt, appeared in person.

The intervenors, Ken Hinchey and Nadine Hinchey, co-partners, as Ken Hinchey Company, appeared in person and by their attorneys, Edward V. Davis and Paul F. Robison.

The intervenors, Ray Wolfe, Esther Wolfe, et al, co-partners as Wolfe Hardware and Furniture, appeared in person and by their attorneys, Edward V. Davis and Paul F. Robison.

The defendants, Audrey Cutting and Sylvia A. Henderson, a minor, appeared by their attorney, Harold J. Butcher.

No appearance was made by the defendant, Ralph R. Thomas, in person or by attorney.

Witnesses were sworn and testified and docu-

mentary evidence introduced on behalf of plaintiffs, intervenors and defendants, and thereafter argument of respective counsel was heard and considered, and the court having heard the testimony and arguments of counsel, thereafter on March 4, 1949, rendered its oral opinion herein on the claims of the several parties and having made its Findings of Fact and Conclusions of Law in accordance therewith, Now Therefore, by reason of the law and the findings aforesaid,

It Is Ordered, Adjudged and Decreed:

That there is due and owing to the respective plaintiffs and intervenors in the above entitled actions, for labor performed and material furnished in the construction of the building on the premises in said Findings and hereinafter described, the amounts respectively due them as set forth in said findings.

That said plaintiffs and intervenors each have a lien upon the said building and premises for the amount of their respective claims as set forth in said findings and as follows:

Plaintiffs in Cause No. A-5087

Ray Bullerdick, for the sum of \$627.77, with interest at the rate of 6% per annum from June 15, 1948, plus the sum of \$2.55.

A. L. Baxley, for the sum of \$914.88, with interest at the rate of 6% per annum from June 10, 1948, plus the sum of \$2.55.

Edward C. Rankin, for the sum of \$494.76, with interest at the rate of 6% per annum from June 12, 1948, plus the sum of \$2.55.

Lee Runkle, for the sum of \$734.16, with interest at the rate of 6% per annum from June 10, 1948, plus the sum of \$2.55.

Arden Bell, for the sum of \$760.76, with interest at the rate of 6% per annum from June 11, 1948, plus the sum of \$2.55.

William Besser, for the sum of \$64.00, with interest at the rate of 6% per annum from May 21, 1948, plus the sum of \$2.55.

The above named plaintiffs, jointly, for the sum of \$750.00 as reasonable attorney's fees for the prosecution of said action, together with their costs of suit, taxed at \$111.00.

Plaintiffs in Cause No. A-5088

Ted Van Thiel, Patsy Van Thiel, et al, co-partners at Kennedy Hardware, and Gene Brady, all co-partners as Brady's Floor Covering, for the sum of \$474.41, with interest at 6% per annum from June 8, 1948, plus the sum of \$4.05.

E. V. Fritts, et al, co-partners as Alaska Paint and Glass Co., for the sum of \$700.00, with interest at 6% per annum from June 21, 1948, plus the sum of \$3.40.

City Electric of Anchorage, Inc., a corporation, for the sum of \$473.99, with interest at 6% per annum from June 23, 1948, plus the sum of \$2.85.

The above named plaintiffs, jointly, for the sum

of \$350.00 as reasonable attorney's fees for the prosecution of said action, together with their costs of suit, taxed at \$33.00.

Intervenors

Arthur F. Waldron and Joseph A. Columbus, co-partners as Anchorage Sand and Gravel Company, for the sum of \$377.61 on their first cause of action, with interest at 6% per annum from May 29, 1948, plus the sum of \$2.50, and for the sum of \$628.27 on their second cause of action, with interest at 6% per annum from May 18, 1948, plus the sum of \$2.50, and for the sum of \$300.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit, taxed at \$.....

Ketchikan Spruce Mills, Inc., a corporation, for the sum of \$2,717.86, with interest at 6% per annum from June 9, 1948, plus the sum of \$2.25; and Alaskan Plumbing and Heating Company, Inc., a corporation, for the sum of \$1,685.00, with interest at 6% per annum from June 18, 1948, plus the sum of \$2.25, and said last named intervenors, jointly, for the sum of \$700.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit taxed at \$.....

Ted Van Thiel, Patsy Van Thiel, et al, co-partners as Kennedy Hardware, for the sum of \$112.95, with interest at 6% per annum from June 19, 1948, plus the sum of \$4.05, and for the sum of \$50.00 as reasonable attorney's fees, together with costs of suit taxed at \$.....

Ken Hinchey and Nadine Hinchey, co-partners as Ken Hinchey Company, for the sum of \$680.49, with interest at 6% per annum from May 25, 1948, plus the sum of \$3.60, and for the sum of \$200.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit, taxed at \$.....

Ray Wolfe, Esther Wolfe, et al, co-partners as Wolfe Hardware and Furniture, for the sum of \$199.80, with interest at 6% per annum from June 10, 1948, plus the sum of \$3.60, and for the sum of \$100.00 as reasonable attorney's fees for the prosecution of said action, together with costs of suit taxed at \$.....

And It Is Further Ordered, Adjudged and Decreed,

That the intervenors, Arthur F. Waldron and Joseph A. Columbus, co-partners as Anchorage Sand and Gravel Company, have judgment against the defendant, Audrey Cutting, for the sum of \$377.61, with interest thereon at the rate of 6% per annum from May 29, 1948, to the date hereof and for their costs and disbursements herein, taxed at \$....., together with the sum of \$100.00 attorney's fees for the prosecution of said action, with interest on the whole of said sums at the rate of 6% per annum from the date hereof until paid.

That the intervenor, Ketchikan Spruce Mills, Inc., a corporation, have judgment against the defendant, Audrey Cutting, for the sum of \$2,717.86, with interest thereon at the rate of 6% per annum from June 9, 1948, to the date hereof, and for its costs and disbursements herein, taxed at \$....., together with the sum of \$....., attorney's fees for the

prosecution of said action, with interest on the whole of said sums at the rate of 6% per annum from the date hereof until paid.

It Is Further Ordered, Adjudged and Decreed, that the whole of the premises in said Findings and hereinafter described is required for the convenient use and occupation of the residence building thereon.

It Is Further Ordered and Decreed, that all and singular the said premises in said Findings and hereinafter described be sold at public auction by the United States Marshal for the Third Division, Territory of Alaska, in the manner provided by law for the sale of real estate on execution, and that the plaintiffs and intervenors to whom judgments for their respective liens have been herein awarded, or any of them, or any of the parties to the aforesaid actions may be purchasers at such sale, and that the said Marshal out of the proceeds of said sale shall retain his fees, costs, expenses, and commissions, if any, and from the balance pay to the plaintiffs and intervenors, respectively or their respective attorneys, the amount of their respective liens, including costs, disbursements and attorney's fees, with interest at the rate of 6% per annum from the date of this decree; and that if the proceeds of said sale be insufficient to pay said lien-holders in full, after deducting said Marshal's fees, costs, expenses and commissions, the same shall be applied pro rata to the payment of their respective liens; and that any balance remaining in the hands of said Marshall, after retaining his deductions as aforesaid, and after

paying the amounts due said respective lien-holders, shall be paid to the defendant, Sylvia A. Henderson, a minor; and upon the said sale being made the said Marshal shall give the purchaser or purchasers a Certificate of Sale as provided by law, and the said purchaser or purchasers shall be let into the possession of said premises, and any of the parties to this action who may be in possession of said premises, and any person or persons who, since the commencement of the aforesaid actions has come into possession under them or either of them shall deliver possession thereof to such purchaser or purchasers, on production of said Marshal's Certificate of Sale of said premises.

The following is the description of the property authorized to be sold under and by virtue of this decree:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof, on file and of record in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with the residence building situated thereon.

Dated this 8th day of April, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered April 8, 1949.

[Title of District Court and Causes]

No. A-5087

No. A-5088

No. A-5087 and A-5088

NOTICE OF MOTION FOR ORDER OF STAY
OF EXECUTION

To Ray R. Bullerdick, et. al., Plaintiffs and to
their attorneys:

You will please take notice that on Friday the 6th day of May, 1949, at ten o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the Court Room of the District Court at Anchorage, the defendant will move the Court for an order staying all execution proceedings on the part of the plaintiffs in the above-entitled action on the grounds that the defendants feeling themselves aggrieved by the judgment made and entered on the 8th day of April, 1949, in the above entitled cause, desire to post a supersedeas bond and perfect an appeal.

Said motion will be made and based upon this motion, copy of which is served herewith, upon the pleadings, papers, records, and files in this action.

Dated this 4th day of May, 1949.

/s/ HAROLD J. BUTCHER

[Endorsed]: Filed May 4, 1949.

[Title of District Court and Causes.]

No. A-5087

No. A-5088

No. A-5087 and A-5088

**MOTION FOR ORDER OF STAY
OF EXECUTION**

Come now the defendants in the above entitled action, and by their attorney, Harold J. Butcher, and moves the Court for an order staying execution on the judgment herein for the period of sixty (60) days.

This motion is based upon the fact that the defendants have posted a good and sufficient bond conditioned for the payment of the judgment herein, with interests and costs, in the event defendants fail to perfect an appeal and furnish supersedeas bond according to law, within said period of sixty (60) days.

Dated this 4th day of May, 1949.

/s/ HAROLD J. BUTCHER

[Endorsed]: Filed May 4, 1949.

United States of America,
Territory of Alaska—ss.

AFFIDAVIT

Audrey Cutting, being first duly sworn and upon her oath deposes and says:

That she is the mother and the duly appointed guardian of Sylvia A. Henderson, a minor, and that on the 8th day of April, 1949, a judgment was entered against affiant and the said Sylvia A. Henderson in the sum of Fourteen Thousand One Hundred Dollars and Eighty Cents (\$14,100.80), plus costs, by the District Court of the Third Division, Territory of Alaska;

That Sylvia A. Henderson on or about the 26th day of March, 1949, and without the knowledge of affiant left her school near Portland, Oregon, and eloped with a man, and that affiant has brought charges against said man whose name is Dick Duhaime, and has requested Police Authorities to seek out and arrest said Dick Duhaime, and the minor daughter of affiant whose whereabouts is unknown to affiant, and to this date affiant has not been able to locate said minor daughter or Dick Duhaime, the man with which she has eloped;

That as a result affiant has not been able to notify said Sylvia A. Henderson of the judgment entered against the real property of said Sylvia A. Henderson, or to notify the said Sylvia A. Henderson of the sale of said property under order of the Court for satisfaction of the judgment, and that at the date of the making of this affidavit the said Sylvia A.

Henderson, owner of Lot Number 2 in Block Number 37 D of the South Addition to the Townsite of Anchorage, does not know of the entry of said judgment against her and the property which she owns.

/s/ AUDREY CUTTING

Subscribed and sworn to before me this 18th day of May, 1949.

[Seal] /s/ HAROLD J. BUTCHER,
Notary Public in and for the Territory of
Alaska.

My Commission expires April 21, 1953.

[Endorsed]: Filed May 19, 1949.

No. A-5087 and No. A-5088

HEARING ON MOTION FOR STAY OF EXECUTION

Now at this time hearing on motion for stay of execution in cause No. A-5087, entitled Ray Bullerdick, et al, Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al, Defendants, and cause No. A-5088, entitled Ted Van Thiel, et al, Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al, Defendants, came on regularly before the Court, the plaintiffs and intervenors not being present but represented by George B. Grigsby, Edward V. Davis and J. L. McCarrey, Jr., the defendants not being present but represented by their counsel Harold J. Butcher. The following proceedings were had, to-wit:

Argument to the Court was had by George B. Grigsby, for and in behalf of the plaintiff.

Argument to the Court was had by Edward V. Davis, for and in behalf of the Intervenor.

Argument to the Court was had by George B. Grigsby, for and in behalf of the plaintiff.

Argument to the Court was had by Harold J. Butcher, for and in behalf of the defendant.

Argument to the Court was had by Edward V. Davis, for and in behalf of the Intervenor.

Argument to the Court was had by George B. Grigsby, for and in behalf of the plaintiffs.

Whereupon the Court having heard the argument of respective counsel and being fully and duly advised in the premises, denies bond, and directs, following stipulation by and between respective counsel, the sale of subject property adjourned until 2:00 o'clock p.m. of Thursday, May 26, 1949.

Entered May 19, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Audrey Cutting and Sylvia A. Henderson defendants above named, hereby appeal to the Circuit Court of Appeals for the 9th Circuit from the judgment entered in this action on the 8th day of April, 1949.

/s/ HAROLD J. BUTCHER

Attorney for Appellants

[Endorsed]: Filed May 19, 1949.

No. A-5087

MINUTE ORDER EXTENDING TIME TO
DOCKET CAUSE WITH COURT OF
APPEALS

Now at this time, upon the motion of Harold J. Butcher, counsel for Defendant Audrey Cutting, with George B. Grigsby, counsel for plaintiff, objecting thereto,

It is ordered that Defendant Cutting be, and she is hereby, given 30 days from this date to docket cause No. A-5087, entitled Ray Bullerdick, et al, plaintiffs, versus Ralph R. Thomas, et al, defendants, with the Court of Appeals, Ninth Circuit.

Entered June 14, 1949.

[Title of District Court and Causes.]

No. A-5087 and No. A-5088 Consolidated

DESIGNATION OF RECORD

Appellant designates for the record an appeal in the above entitled case the entire and complete record of proceedings including the transcript of the trial, but excepting the various motions and affidavits to intervene and to consolidate the two cases numbered A-5087 and A-5088.

/s/ HAROLD J. BUTCHER

[Endorsed]: Filed July 2, 1949.

[Title of District Court and Causes.]

No. A-5087 and No. A-5088 Consolidated.

BOND ON APPEAL

Know all men by these presents that we, Audrey Cutting as principal and Sylvia A. Henderson as principal, binding herself herein by and through her legal guardian, Audrey Cutting, and Marion P. Smith as surety, are held and firmly bound to the above named plaintiffs and all of them, and to their heirs, executors, administrators, assigns, and successors, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said above named plaintiffs, their heirs, executors, administrators, successors, and assigns, payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, by these presents.

Sealed with our hands and dated this 18th day of June, 1949.

The condition of this bond is such that, whereas, on the 8th day of April, 1949, in a suit pending in the above entitled court by the above named plaintiffs and Audrey Cutting and Sylvia A. Henderson as defendants, and in favor of the said plaintiffs, and the said defendants having filed Notice of Appeal to the United States Circuit Court of Appeals for the 9th Circuit, and a citation having been issued, directed to the said plaintiffs, citing them to appear in said Court at San Francisco,

California, forty days from and after the date of such citation.

Now the condition of the above obligation is such that if the said defendants shall prosecute said appeal with effect, or if they shall pay all costs of the appeal if the appeal be dismissed or the judgment is modified, then the above obligation is to be void otherwise to remain in full force and effect.

/s/ AUDREY CUTTING

Principal.

/s/ SYLVIA A. HENDERSON

Principal.

By /s/ AUDREY CUTTING

Her legal guardian.

/s/ MARION P. SMITH

Surety.

United States of America,
Territory of Alaska—ss.

Audrey Cutting for herself and as legal guardian for Sylvia A. Henderson, and Marion P. Smith, being first duly sworn, each for himself and not one for the other, deposes and says:

That I am a resident of the Territory of Alaska; that I am not a counselor or attorney at Law; that I am not a marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that I am worth the sum of One Thousand Dollars over

and above all my debts and liabilities and exclusive of property exempt from execution.

/s/ AUDREY CUTTING

/s/ SYLVIA A. HENDERSON

By /s/ AUDREY CUTTING

Her legal guardian.

/s/ MARION P. SMITH

Subscribed and sworn to before me this 18th day of June, 1949.

/s/ HAROLD J. BUTCHER

Notary Public in and for Alaska.

My commission expires April 21, 1953.

[Endorsed]: Filed July 2, 1949.

[Title of District Court and Causes.]

No. A-5087 and No. A-5088 Consolidated.

MOTION TO EXTEND THE TIME FOR
FILING AND DOCKETING RECORD OF
APPEAL

Comes now the defendants, Audrey Cutting and Sylvia A. Henderson, and move this Honorable Court to extend the time for filing and docketing the record with the United States Court of Appeals at San Francisco for fifteen days, or to such time as will enable the Clerk of the Court and the Court Reporter to prepare the transcript of record and proceedings.

/s/ HAROLD J. BUTCHER

Attorney for Defendants.

[Endorsed]: Filed July 13, 1949.

[Title of District Court and Causes.]

No. A-5087 and No. A-5088 Consolidated.

ORDER

The defendants, Audrey Cutting and Sylvia A. Henderson, through their attorney, Harold J. Butcher, having filed a motion for extending the time for filing and docketing the record on appeal, and good cause being shown therefore, it is hereby:

Ordered that the time for filing and docketing the record on appeal in the above entitled cause be extended for a period of twenty-one days from the date of this order.

Dated at Anchorage, Alaska, this 14th day of July, 1949.

/s/ ANTHONY J. DIMOND

District Judge

Entered July 14, 1949.

[Endorsed]: Filed July 14, 1949.

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed

116 pages, numbered from 1 to 116, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the designation of record filed in my office on the 2nd day of July, 1949; that the foregoing transcript has been prepared, examined and certified to by me, and the costs thereof, amounting to \$71.20, has been paid to me by Harold J. Butcher, counsel for Defendants Cutting and Henderson herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 29th day of July, 1949.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellant,

vs.

RAY BULLERDICK, et al,

Appellees.

Transcript of Record
In Three Volumes
Volume II
(Pages 117 to 238)

Appeal from the District Court for the
Territory of Alaska,
Third Division

FILED

AUG 4 1950

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellant,

vs.

RAY BULLERDICK, et al,

Appellees.

Transcript of Record
In Three Volumes
Volume II
(Pages 117 to 238)

Appeal from the District Court for the
Territory of Alaska,
Third Division

In the District Court for the Territory of Alaska
Third Division

No. A-5088

TED VAN THIEL, PATSY VAN THIEL, E. P.
CARTEE, JEAN CARTEE, R. C. REEVE,
and JANICE REEVE, Co-partners under the
firm name and style of KENNEDY HARD-
WARE, and GENE BRADY, Co-partners
under the firm name and style of BRADY'S
FLOOR COVERING, and

E. V. FRITTS, WILLIAM J. WALLACE, and
EINER G. NELSON, Co-partners under the
firm name and style of ALASKA PAINT AND
GLASS CO., and

CITY ELECTRIC OF ANCHORAGE, INC., a
corporation,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

COMPLAINT

Come now the plaintiffs in the above entitled
action, and complaining against the defendants
herein, for their respective causes of action severally
allege as follows:

First Cause of Action:

The plaintiffs, Ted Van Thiel, Patsy Van Thiel,

E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, co-partners under the firm name and style of Kennedy Hardware, and Gene Brady, Co-partners under the firm name and style of Brady's Floor Covering, for cause of action allege:

I.

That at all times herein mentioned the plaintiffs, Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve were co-partners under the firm name and style of Kennedy Hardware.

II.

That at all times herein mentioned the plaintiffs named in the preceding paragraph and the plaintiff Gene Brady were co-partners under the firm name and style of Brady's Floor Covering.

III.

That at all times herein mentioned the defendant Ralph Russell Thomas was and ever since has been and now is the owner of that certain real property situate in the City of Anchorage, Alaska, more particularly described as follows:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

IV.

That during all times herein mentioned the defendant Audrey Cutting was and ever since has been and now is the reputed owner of the above described premises and has or claims to have some right, title or interest therein, the nature of which is unknown to these plaintiffs, and therefore not stated, but which plaintiffs allege is subject to the lien of plaintiffs hereinafter set forth.

V.

That during the period beginning June 2, 1948 and ending June 8, 1948, these plaintiffs furnished defendant Russell W. Smith had charge of and was engaged in the construction of a residence building on the premises hereinbefore described under a contract with the defendant Audrey Cutting, the nature and terms of which are unknown to plaintiffs and therefore are not stated; that said construction was with the knowledge, consent and at the instance of the defendant, Ralph Russell Thomas.

VI.

That during the period beginning June 2, 1949 and ending June 8, 1948, these plaintiffs furnished material and labor in the construction of the afore-said building for and at the request of the said Russell W. Smith at the agreed price and of the reasonable value of Four Hundred Seventy-Four and 41/100 Dollars (\$474.41).

That said material was used and said labor performed in covering the floors of said building and

the sink top in the kitchen thereof with linoleum, which became a permanent part of said building.

VII.

That said Russell W. Smith has not paid the sum so due, as aforesaid, to plaintiffs, nor any part thereof, although frequently requested so to do and the same is now due and owing from said defendant to plaintiffs.

VIII.

That the whole of the real property hereinabove described is required for the convenient use and occupation of the residence building hereinbefore mentioned.

IX.

That by the reason of the premises, plaintiffs acquired a lien upon the premises hereinbefore described for the sum due them, as aforesaid, and for the purpose of securing and perfecting their said lien, plaintiffs on the 21st day of July, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of their demand, duly verified, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the name of the person to whom they furnished the material and labor and also a description of the property to be charged with said lien, sufficient for identification; that said Claim of Lien was duly recorded in Book 70 of City Records of said Recording Precinct at page 287: that a true

and correct copy of said Claim of Lien is hereunto annexed, marked "Exhibit A" and made a part of this complaint.

That plaintiffs paid for filing and recording said Claim of Lien the sum of \$4.05.

X.

That the sum of Three Hundred Fifty Dollars (\$350.00) is a reasonable amount to be allowed by the Court as Attorney's fees for the prosecution of this suit.

Second Cause of Action:

The plaintiffs, E. V. Fritts, William J. Wallace, and Einer G. Nelson, co-partners under the firm name and style of Alaska Paint and Glass Co., for cause of action allege:

I.

That at all times herein mentioned, the plaintiffs, E. V. Fritts, William J. Wallace, and Einer G. Nelson were co-partners under the firm name and style of Alaska Paint and Glass Co.

II.

That at all times herein mentioned the defendant Ralph Russell Thomas was and ever since has been and now is the owner of that certain real property situate in the City of Anchorage, Alaska, more particularly described as follows:

Lot Two (2) in Block Thirty-seven D (37D)
of the South Addition to the City of Anchorage

according to the official map and plat thereof on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

III.

That during all the times herein mentioned the defendant Audrey Cutting was and ever since has been and now is the reputed owner of the above described premises and has or claims to have some right, title or interest therein, the nature of which is unknown to these plaintiffs, and therefore not stated, but which plaintiffs allege is subject to the lien of plaintiffs hereinafter set forth.

IV.

That during all the times hereinafter in the next paragraph of this cause of action mentioned, the defendant Russell W. Smith had charge of and was engaged in the construction of a residence building on the premises hereinbefore described under a contract with the defendant Audrey Cutting, the nature and terms of which are unknown to plaintiffs and therefore not stated; that said construction was with the knowledge, consent and at the instance of the defendant, Ralph Russell Thomas.

V.

That during the period beginning June 1, 1948 and ending June 21, 1948, plaintiffs furnished material and labor in the construction of the aforesaid building for and at the request of the said

Russell W. Smith at the contract price and of the reasonable value of Seven Hundred Dollars (\$700.00), for which the said Russell W. Smith promised and agreed to pay.

That said material and labor consisted of Perfa-taping and heavy coating the walls and ceilings and painting the interior woodwork and the exterior of the said building, all of which was done in the original construction of said building and became a permanent part thereof.

VI.

That said Russell W. Smith has not paid the sum so due, as aforesaid, to plaintiffs, nor any part thereof, although frequently requested so to do and the same is now due and owing from said defendant to plaintiffs.

VII.

That the whole of the real property hereinabove described is required for the convenient use and occupation of the residence building hereinbefore mentioned.

VIII.

That by reason of the premises, plaintiffs acquired a lien upon the premises hereinbefore described for the sum due them, as aforesaid, and for the purpose of securing and perfecting their said lien, plaintiffs on the 21st day of July, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of their demand, duly verified, after deducting all just credits and offsets, with the name

of the owner and reputed owner, and also the name of the person to whom they furnished the material and labor and also a description of the property to be charged with said lien, sufficient for identification; that said Claim of Lien was duly recorded in Book 70 of City Records of said Recording Precinct at page 286; that a true and correct copy of said claim of lien is hereto attached, marked "Exhibit B" and made a part of this Complaint.

That plaintiffs paid for filing and recording said Claim of Lien the sum of \$3.40.

IX.

That the sum of Three Hundred Fifty Dollars (\$350.00) is a reasonable amount to be allowed by the Court as attorney's fees for the prosecution of this suit.

Third Cause of Action:

The plaintiff, City Electric of Anchorage, Inc., a corporation, for cause of action, alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and doing business in Anchorage, Alaska, and has paid its annual corporation tax last due.

II.

That at all times herein mentioned the defendant Ralph Russell Thomas was and ever since has been and now is the owner of that certain real property

situate in the City of Anchorage, Alaska, more particularly described as follows:

Lot Two (2) in Block Thirty-seven D (37D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

III.

That during all the times herein mentioned the defendant Audrey Cutting was and ever since has been and now is the reputed owner of the above described premises and has or claims to have some right, title or interest therein, the nature of which is unknown to these plaintiffs, and therefore not stated, but which plaintiff alleges is subject to the lien of plaintiff hereinafter set forth.

IV.

That during all the times hereinafter in the next paragraph of this cause of action mentioned, the defendant Russell W. Smith had charge of and was engaged in the construction of a residence building on the premises hereinbefore described under a contract with the defendant Audrey Cutting, the nature and terms of which are unknown to plaintiff and therefore not stated; that said construction was with the knowledge, consent and at the instance of the defendant, Ralph Russell Thomas.

V.

That during the period beginning April 28, 1948 and ending June 23, 1948, this plaintiff furnished material and labor in the construction of the aforesaid building for and at the request of the said Russell W. Smith at the agreed price and of the reaonable value of Four Hundred Seventy-three and 99/100 Dollars (\$473.99), for which the said Russell W. Smith promised and agreed to pay.

That said labor and material consisted of repairing tools, used in said construction, installing temporary wiring in said building for the use of electricity necessary in the construction thereof, and installing permanent wiring for use in said building as a residence, all of which was done in the original construction of said building and became a permanent part thereof.

VI.

That said Russell W. Smith has not paid the sum so due, as aforesaid, to plaintiff, nor any part thereof, although frequently requested so to do, and the same is now due and owing from said defendant to plaintiff.

VII.

That the whole of the real propety hereinabove described is required for the convenient use and occupation of the residence building hereinbefore mentioned.

VIII.

That by reason of the premises, plaintiff acquired a lien upon the premises hereinbefore described for

the sum due them, as aforesaid, and for the purpose of securing and perfecting its said lien, plaintiff on the 23rd day of July, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of its demand, duly verified, after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the name of the person to whom it furnished the material and labor and also a description of the property to be charged with said lien, sufficient for identification; that said Claim of Lien was duly recorded in Book 70 of City Records of said Recording Precinct at page 286; that a true and correct copy of said claim of lien is hereto annexed, marked "Exhibit C" and made a part of this Complaint.

That plaintiff paid for filing and recording said Claim of Lien the sum of \$2.85.

IX.

That the sum of Three Hundred Fifty Dollars (\$350.00) is a reasonable amount to be allowed by the Court as attorney's fees in the prosecution of this suit.

Wherefore, the plaintiffs pray:

1. That the Court decree that the plaintiffs, and each of them, have liens upon the said premises herein described, including the building thereon, for the sums respectively due them, as alleged in the Complaint, with interest according to law, and costs

and disbursements, including attorney's fees, and expense of filing and recording said Claims of Lien, and

2. That all of said real property and the building thereon be sold under order and decree of this Court according to law and the proceeds thereof applied to the payment of the sums found due to plaintiffs, as aforesaid; that the plaintiffs, or any of them, may become purchasers at said sale, and that said plaintiffs may have such other and further relief as to the Court may seem equitable in the premises.

/s/ GEORGE B. GRIGSBY

Attorney for Plaintiffs

Duly verified—Gene Brady and William J. Wallace.

Duly verified—Leslie Larson for City Electric of Anchorage Inc.

Exhibit "A"

TED VAN THIEL, PATSY VAN THIEL, E. P. CARTEE, JEAN CARTEE, R. C. REEVE, and JANICE REEVE, Co-partners under the firm name and style of KENNEDY HARDWARE, and GENE BRADY, Co-partners under the firm name and style of BRADY'S FLOOR COVERING,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH, RALPH RUSSELL THOMAS, AND LOT TWO (2) IN BLOCK THIRTY-SEVEN D (37D) OF THE SOUTH ADDITION TO THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimants claim a lien upon the following described premises situate in the City of Anchorage, to wit:

Lot Two (2) in Block Thirty-seven D (37D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

That the owners and reputed owners of the above

described premises are Ralph Russell Thomas and Audrey Cutting.

That the residence building now on said premises was constructed by the above named Russell W. Smith under a contract with the said Audrey Cutting, with the knowledge and consent of the said Ralph Russell Thomas, and was under construction during all the times hereinafter mentioned.

That during the period beginning June 2d, 1948, and ending June 8th, 1948, the above named claimants furnished material and labor in the construction of said building for and at the request of the said Russell W. Smith and for which he promised and agreed to pay, at the agreed price and of the reasonable value, the sum of \$474.41.

That said material and labor was used and performed in covering the floors of said building and the sink top in the kitchen thereof with linoleum, which became a permanent part of said building, an itemized account of which labor and services is as follows:

6 feet cap strip	@ .20	\$.20
3 sq. yds. Standard Grade Linoleum	@ 3.00	9.00
1 length metal90
63 $\frac{2}{3}$ sq. yds. heavy gauge Linoleum		
installed.....	@ 5.50	350.13
141 $\frac{1}{3}$ sq. yds. installed	@ 4.50	64.49
16 feet cove stick10	1.60
12 feet face metal	@ .30	3.60
24 feet cap strip	@ .20	4.80
8 hours labor on sink top	@ 4.25	34.00
		<hr/>
		\$469.72
1% tax		4.69
		<hr/>
		\$474.41

That there is now due and owing from the said Russell W. Smith to claimants for the material and labor so furnished as aforesaid, after deducting all just credits and off-sets, the sum of \$474.41.

Wherefore, these claimants claim a lien upon the aforementioned premises and the residence building thereon for the material and labor furnished as aforesaid in the sum of \$474.41.

GENE BRADY.

Duly verified.

EXHIBIT "B"

E. V. FRITTS, WILLIAM J. WALLACE and
EINER G. NELSON, co-partners under the
firm name and style of ALASKA PAINT AND
GLASS CO.,

Claimants,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37-D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimants claim a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage according to the official map and plat thereof on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

That the owners and reputed owners of the above described premises are Ralph Russell Thomas and Audrey Cutting.

That the residence building now on said premises was constructed by the above named Russell W. Smith under a contract with the said Audrey Cutting, with the knowledge and consent of the said Ralph Russell Thomas, and was under construction during all the times hereinafter mentioned.

That this lien is claimed for labor and material furnished in the construction of said building by the above named claimants during the period beginning June 1st, 1948, and ending June 21st, 1948, consisting of Perfa-taping and heavy coating the walls and ceilings, and painting the interior woodwork and the exterior of said building, all of which was done in the original construction of said building and became a permanent part thereof.

That said labor and material were furnished for and at the request of the said Russell W. Smith at the contract price of \$700.00 which he promised and agreed to pay, and there is now due and owing to

the claimants from the said Russell W. Smith, after deducting all just credits and off-sets, said sum of \$700.00.

Wherefore, the above named claimants claim a lien upon the afore-described premises for the sum of \$700.00.

WILLIAM J. WALLACE.

Duly verified.

EXHIBIT "C"

CITY ELECTRIC OF ANCHORAGE, INC., a
corporation,

Claimant,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS, AND LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37-D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimants claim a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D)
of the South Addition to the City of Anchorage
according to the official map and plat thereof

on file in the office of the recorder for the precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

That the owners and reputed owners of the above described premises are Ralph Russell Thomas and Audrey Cutting.

That the residence building now on said premises was constructed by the above named Russell W. Smith under a contract with the said Audrey Cutting, with the knowledge and consent of the said Ralph Russell Thomas, and was under construction during all the times hereinafter mentioned.

That this lien is claimed for labor and material furnished by the above named claimant in the construction of said building during the period beginning April 28, 1948, and ending June 23, 1948, for and at the request of the said Russell W. Smith and for which he promised and agreed to pay at the agreed price and of the reasonable value, the sum of \$473.99.

That said labor and material consisted of repairing tools used in said construction, installing temporary wiring in said building for the use of electricity necessary in the construction thereof, and installing permanent wiring for use in said building as a residence. That an itemized account of said labor and material is as follows:

April 28, 1948,		
Repairs on Black & Decker Saw	\$	8.98
June 8, 1948,		
Repairs on Black & Decker Saw		13.28
June 18, 1948,		
Repairs on Black & Decker Holding Gun		23.21
		<hr/>
		\$ 45.47
May 10, 1948,		
Wiring for new temporary service, material..	\$	35.65
3½ hours labor @ 4.25 per hour		14.90
		<hr/>
		50.55
May 20, 1948, to June 23, 1948,		
Permanent house wiring,		
Material	\$	167.53
Labor		206.19
		<hr/>
		373.72
1% Tax on temporary and permanent wiring.....		4.25
		<hr/>
Total.....		\$473.99

That there is now due and owing from the said Russell W. Smith to claimant for the labor and material so furnished, as aforesaid, after deducting all just credits and off-sets, the sum of \$473.99.

Wherefore, this claimant claims a lien upon the aforementioned premises and the residence building thereon for the labor and materials so furnished, as aforesaid, in the sum of \$473.99.

CITY OF ELECTRIC OF
ANCHORAGE, INC.

By /s/ LESLIE LARSON,
President.

Duly verified.

[Endorsed]: Filed July 24, 1948.

[Title of District Court and Cause.]

No. A-5088

APPEARANCE

Comes now Audrey Cutting, the defendant in the above entitled cause, and makes this her appearance, in this action.

/s/ AUDREY CUTTING.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1948.

[Title of District Court and Causes.]

No. A-5088

SUMMONS

The President of the United States of America,
Greeting: To the Above-named Defendants:

You Are Hereby Required to appear in the District Court for the Territory of Alaska, Third Division, within thirty days after the date of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiffs will take judgment against you for want thereof, and will apply to the Court for the relief demanded in said complaint.

Witness, the Hon. Anthony J. Dimond, Judge of said Court, this 24th day of July, in the year of our Lord one thousand nine hundred and Forty-eight.

M. E. S. BRUNELLE,
Clerk.

[Seal] By /s/ VIRGINIA OLSON,
Deputy Clerk.

Receipt of copy acknowledged.

[Endorsed]: Filed August 4, 1948.

[Title of District Court and Cause.]

No. A-5088

NOTICE OF APPEARANCE

To: George Grigsby, Attorney for Plaintiffs.

Please Take Notice that we have been retained by and hereby appear for the above-named defendants Russell W. Smith in the above-entitled cause.

CUDDY & KAY.

WENDELL P. KAY,
Of Attorneys for
Defendants.

[Endorsed]: Filed August 5, 1948.

[Title of District Court and Cause.]

No. A-5088

ANSWER

Comes now the defendant, Audrey Cutting, and answering the first cause of action set forth in plaintiff's complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Admits that she is the owner of that certain real property situate in the City of Anchorage, Alaska, and more particularly described as follows:

Lot Two (2) in Block Thirty-seven D (37 D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska,

but denies that either she or anyone authorized by her as agent employed the plaintiff in any capacity whatsoever to perform services and/or furnish materials on the subject real property or to any building located thereon.

II.

Denies that the plaintiff has acquired a lien against said real property or any building thereon.

III.

Denies that the sum alleged in paragraph VI of plaintiffs' first cause of action, i.e. \$474.41, or any

other sum, is now due and owing from the defendant to the plaintiff.

Answer to Second Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the second cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges and adopts as part of her answer to the second cause of action all of the allegations set forth in paragraphs I, II and III of her answer to the first cause of action.

II.

Denies that the sum alleged in paragraph V of the second cause of action, i.e., \$700.00, or any other sum is now due and owing from the defendant to the plaintiff.

Answer to Third Cause of Action:

Comes now the defendant, Audrey Cutting, and answering the third cause of action set forth in plaintiffs' complaint, for herself and not for any other defendant, admits and denies as follows:

I.

Defendant reaffirms, realleges, and adopts as part of her answer to the third cause of action all of the allegations set forth in paragraphs I, II, and III of her answer to plaintiff's first cause of action.

II.

Denies that the sum alleged in paragraph V, i.e. \$473.99, or any other sum, is now due and owing from the defendant to the plaintiff.

Wherefore, defendant, having fully answered the complaint filed by plaintiff, pray this Honorable Court to dismiss the same with costs assessed to the plaintiffs.

HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed September 9, 1948.

[Title of District Court and Cause.]

No. A-5088

NOTICE OF MOTION FOR LEAVE TO INTERVENE AND MAKE ADDITIONAL PARTIES DEFENDANTS.

To: Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, Co-partners under the firm name and style of Kennedy Hardware, and Gene Brady, Co-partners under the firm name and style of Brady's Floor Covering, and E. V. Fritts, William J. Wallace and Einer G. Nelson, Co-partners under the firm name and style of Alaska Paint & Glass Co., and City Electric of Anchorage, Inc., a corporation, and to George Grigsby, their attorney; Ralph R. Thomas, Audrey Cutting and Russell W. Smith; Audrey Cutting, as the Mother and Next Friend of Sylvia A. Henderson, a Minor; Ketchikan Spruce Mills, Inc., a corporation; Alaskan Plumbing & Heating Company, a corporation; Ken Hinchey Co., Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, Co-partners doing business under the firm name and style of Wolfe Hardware & Furniture:

You Will Please Take Notice that on Friday, the 29th day of October, 1948, at 2 o'clock p.m. of said day, or as soon thereafter as counsel can be heard, at the District Court for the Third Judicial District of the Territory of Alaska, at Anchorage, Alaska,

the petitioners, Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand and Gravel Company, will move the Court for leave to intervene and file their Complaint in Intervention in the above entitled cause, and to make Audrey Cutting, as the Mother and Next Friend of Sylvia A. Henderson, a Minor, Ketchikan Spruce Mills, Inc., a corporation, Alaskan Plumbing & Heating Company, a corporation, Ken Hinchey Co., Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, Co-partners doing business under the firm name and style of Wolfe Hardware & Furniture, additional defendants in the above entitled action, on the grounds that the petitioners are lien claimants against the above named defendants, and the said Audrey Cutting, as Mother and Next Friend of Sylvia A. Henderson, a Minor, Ketchikan Spruce Mills, Inc., a corporation, Alaskan Plumbing & Heating Company, a corporation, Ken Hinchey Co., Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, co-partners doing business under the firm name and style of Wolfe Hardware & Furniture, also claim some right, title and interest in the issues involved in this cause of action, and your petitioners believe that the ends of justice will best be served by all parties named herein if said Motion is granted.

Said motion will be made and based upon this notice, and upon the pleadings, papers, records and files in this action.

Dated this 21st day of October, 1948.

/s/ J. L. McCARREY, JR.,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

No. A-5088

PETITION TO INTERVENE

To: The Honorable Anthony J. Dimond, Judge of
the District Court, Third Judicial Division,
Territory of Alaska.

The Petition of Ketchikan Spruce Mills, Inc., a
Corporation, and Alaskan Plumbing and Heating
Company, Inc., a Corporation, of Anchorage, Alaska,
respectfully shows:

1. That the above named plaintiffs have filed a
complaint against the above-named defendants pray-
ing that their claim of lien against Lot Two (2),
in Block Thirty-Seven "D" (37 D), of the South
Addition to the City of Anchorage, according to the
map and plat thereof on file in office of U. S. Com-
missioner, ex-Officio Precinct Recorder for Anchor-
age, Territory of Alaska, together with the residence
building thereon situated, be foreclosed; That the
petitioners herein claim liens upon the same prop-
erty on account of materials delivered thereon; that
their claims of lien have been filed with the recorder
for the Anchorage Precinct, within the time and
manner prescribed by law;

2. That a copy of the complaint in intervention which petitioners ask leave to file is attached hereto and marked Exhibit "A."

Wherefore, your petitioners ask leave to intervene in this action as against both plaintiffs and defendants in this action and that they be granted leave to file the proposed complaint in intervention and for such other and further relief as to the Court may seem proper.

Dated at Anchorage, Alaska, this 28th day of October, 1948.

CUDDY & KAY

/s/ WENDELL P. KAY

Attorneys for Petitioners.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1948.

[Title of District Court and Cause.]

No. A-5088

ORDER TO SHOW CAUSE WHY PETITION
FOR INTERVENTION SHOULD NOT BE
GRANTED

Upon the reading and filing of petition of Ketchikan Spruce Mills, Inc., a Corporation, and Alaskan Plumbing and Heating Company, Inc., a Corporation, praying to intervene as parties in this action and good cause appearing therefor, it is

Hereby ordered, that the above-named plaintiffs and defendants show cause before me in the District Court for the Third Division, Territory of Alaska, in the City of Anchorage, Alaska, on the 5th day of November, 1948, at 3:00 o'clock, p.m., of that day, or as soon thereafter as Counsel can be heard, why the prayer of said petitioners should not be granted.

It is Further Ordered that until the determination of this motion all proceedings herein on the part of the plaintiffs and defendants be stayed.

It is Further Ordered that copies of this Order and said Petition be served upon the above named plaintiffs and defendants at least one day before the time fixed for showing cause.

Dated this 2d day of November, 1948, at Anchorage, Alaska,

/s/ ANTHONY J. DIMOND

Judge of the District Court, Third Division, Territory of Alaska.

Entered Nov. 2, 1948.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1948.

[Title of District Court and Causes.]

No. A-5087

Nos. A-5087 and A-5088

MOTION FOR LEAVE TO INTERVENE AND
MAKE ADDITIONAL PARTIES DEFEND-
ANTS

Based upon the written notice of motion for leave to intervene and make additional parties defendants heretofore filed in the above-entitled Court on the day of October, 1948, the petitioners, Arthur F. Waldron and Joseph A. Columbus, Copartners doing business under the firm name and style of Anchorage Sand and Gravel Company, by and through their attorney, J. L. McCarry, Jr., do hereby move the Honorable Court for leave to intervene and file their complaint in intervention in the above-entitled cause of action, namely, A-5087 and A-5088, and further move the Honorable Court for leave to make Sylvia A. Henderson, a minor, Ketchikan Spruce Mills, Inc., a corporation, Alaskan Plumbing & Heating Company, a corporation, Ken Hinchey Co., Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, Co-partners doing business under the firm name and style of Wolfe Hardware & Furniture, additional defendants in the above-entitled action, on the grounds that the defendants have claims either for labor or material furnished in the construction of that certain dwelling house con-

structed upon Lot Two (2) of Block Thirty-Seven "D" (37-D) of the South Addition to the Original Townsite of Anchorage, Alaska, and your petitioner believes that the end of justice will best be served and the final determination of the matter be earlier obtained by having all of the interests of the various claimants determined in one hearing, and said motion is based upon the pleadings, papers, records and files in this action.

Dated this 2nd day of November, 1948.

/s/ J. L. McCARREY, JR.

Attorney for Petitioners

[Endorsed]: Filed November 8, 1948.

[Title of District Court and Cause.]

No. A-5088

NOTICE OF WITHDRAWAL

Comes now, Cuddy & Kay, and withdraws as Counsel for the above-named Defendant, Russell W. Smith, on the ground that the said Russell W. Smith, is now bankrupt, and the trustee for the bankrupt estate is adequately represented by Counsel.

CUDDY & KAY

By /s/ WENDELL P. KAY.

Dated at Anchorage, Alaska, this 9th day of November, 1948.

[Endorsed]: Filed November 10, 1948.

[Title of District Court and Causes.]

No. A-5087

No. A-5088

Nos. A-5087 and A-5088

ORDER GRANTING LEAVE TO INTERVENE

Based upon the written motion for leave to intervene filed by Arthur F. Waldron and Joseph A. Columbus, Co-partners doing business under the firm name and style of Anchorage Sand and Gavel Company, by and through their attorney, J. L. McCarrey, Jr., requesting leave to intervene in the cases of Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell and William Besser, Plaintiffs, vs. Ralph R. Thomas, Audrey Cutting and Russell W. Smith, Defendants; and Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, Co-partners under the firm name and style of Kennedy Hardware, and Gene Brady, Co-partners under the firm name and style of Brady's Floor Covering, and E. V. Fritts, William J. Wallace and Einer G. Nelson, Co-partners under the firm name and style of Alaska Paint & Glass Co. and City Electric of Anchorage, Inc., a corporation, Plaintiffs, vs. Ralph R. Thomas, Audrey Cutting and Russell W. Smith, Defendants, and upon oral argument by the counsel representing various lien claimants interested in the subject matter of the causes of action now pending in the above-entitled causes of action, as aforesaid and the Court being fully advised in the premises,

It is Hereby Ordered, that Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, Janice Reeve, Co-partners under the firm name and style of Kennedy Hardware: Ketchikan Spruce Mills, Inc., Alaska Plumbing and Heating Company, a corporation, Ken Hinchey, Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe, and Ed Wilholth, Co-partners doing business under the firm name and style of Wolfe Hardware and Furniture Company: and Sylvia A. Henderson, a minor, who have an interest, in the subject matter to be determined by the Court in the cases of Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell and William Besser, Plaintiffs, vs. Ralph R. Thomas, Audrey Cutting and Russell W. Smith, Defendants; and Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, Co-partners under the firm name and style of Kennedy Hardware, and Gene Brady, Co-partners under the firm name and style of Brady's Floor Covering, and E. V. Fritts, William J. Wallace and Einer G. Nelson, Co-partners under the firm name and style of Alaska Paint & Glass Co., and City Electric of Anchorage, Inc., a corporation, Plaintiffs, vs. Ralph R. Thomas, Audrey Cutting and Russell W. Smith, Defendants, may intervene and file their complaint in intervention within three days from the signing of this Order, namely, three days from the 9th day of November, 1948, upon the intervenors first serving a copy of their complaint in intervention and/or a copy of the summons, together

with a copy of the complaint, upon the other interested parties, aforesaid, in said causes of action, and filing the same in Court on or before the 12th day of November, 1948.

Done in Open Court this 9th day of November, 1948.

Entered Nov. 10, 1948.

/s/ ANTHONY J. DIMOND

Judge of the District Court.

EXHIBIT "B"

ALASKAN PLUMBING AND HEATING COMPANY, INC., a Corporation

Claimant,

vs.

AUDREY CUTTING, RUSSELL SMITH and
RALPH RUSSELL THOMAS,

Defendants.

CLAIM OF LIEN

Notice is Hereby Given that the Alaskan Plumbing Heating Company, Inc., claims a lien upon

Lot Two (2), Block Thirty-seven "D" (37-D)
of the South Addition to the City of Anchorage,
Territory of Alaska,

for and on account of materials expended upon said building; that the name of the owners, or reputed owners, of said property is Audrey Cutting, Russell

Smith and Ralph Russell Thomas, that the said materials were delivered upon the said property at the instance and request of the said Audrey Cutting and Russell Smith, between the 21st day of May, 1948, and the 18th day of June, 1948, to be used in the construction, alterations or repair of the above mentioned property; that ninety (90) days have not elapsed since the date of furnishing said materials on the property; that the amount claimant demands for said materials is as follows:

Materials furnished between May 21, 1948, and June 18, 1949, \$1,685.00.

That no part thereof has been paid, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of \$1,685.00, in which amount it claims a lien upon said property.

Dated at Anchorage, Alaska, this 31 day of July, 1948.

ALASKAN PLUMBING AND
HEATING COMPANY, INC.

By /s/ LEO J. HALDIMAN

Duly verified.

[Endorsed]: Filed November 10, 1948.

[Title of District Court and Cause.]

No. A-5088

COMPLAINT IN INTERVENTION

Comes now Ketchikan Spruce Mills, Inc., and Alaskan Plumbing and Heating Company, Inc., after leave of the Court first had and obtained and files this, their complaint in intervention in the above-entitled cause and alleges:

That Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, Co-partners under the firm name and style of Kennedy Hardware, and Gene Brady, Co-partners under the firm name and style of Brady's Floor Covering, and E. V. Fritts, William J. Wallace, and Einer G. Nelson, Co-partners under the firm name and style of Alaska Paint and Glass Co., and City Electric of Anchorage, Inc., a Corporation, plaintiffs, have filed an action to foreclose their respective claims of lien on

Lot Two (2), Block Thirty-seven "D" (37-D) of the South Addition to the City of Anchorage, according to map and plat thereof on file in office of U. S. Commissioner, ex-Officio Precinct Recorder for Anchorage, Territory of Alaska.

That the defendant, Audrey Cutting, was and has been and now is the reputed owner of the above-described premises, and has, or claims to have, some right, title and interest therein; that the defendant

R. W. Smith had charge and was engaged in the construction of the residence building on the premises hereinbefore described under a contract with the defendant Audrey Cutting: that the plaintiffs in intervention claim a lien on the same above-described land and residence for materials delivered to the premises and that a second action to foreclose their lien would cause needless expense and time; that the plaintiffs in intervention are proper parties to be joined in this action.

First Cause of Action

I.

That the plaintiff Ketchikan Spruce Mills, Inc., is a corporation organized and existing under and by virtue of the Laws of the Territory of Alaska; that said corporation had paid its 1948 license tax and has filed its financial statement due on the 1st day of March, 1948, and is qualified to do business in the Territory of Alaska.

II.

That on or about the 1st day of May, 1948, plaintiff entered into a verbal contract with Russell W. Smith, and Audrey Cutting, defendants, for the furnishing of materials for the construction of a building located on Lot Two (2), Block Thirty-seven "D" (37-D), of the South Addition to the City of Anchorage, Territory of Alaska.

III.

That between the dates of May 3, 1948, and June 9, 1948, plaintiff in intervention furnished materials under the aforesaid contract of the reasonable value of Two Thousand Seven Hundred Seventeen and 86/100 (\$2,717.86) Dollars.

IV.

That in order to secure the payment of said sum of \$2,717.86, plaintiff in intervention prepared a notice of lien dated the 19th day of July, 1948, which claim contained a true statement of said plaintiffs' demand and the amount thereof, and also the names of the persons who directed that such materials be furnished, to wit: Audrey Cutting and Russell Smith, giving the dates when said materials were furnished by it, and also containing a description of the property on which said lien was issued, sufficient for identification, as well as the names of the owner, or owners of record thereof, which said claim was duly verified by claimant and thereafter on the 20th day of July, 1948, and within ninety (90) days from the last day upon which plaintiff in intervention so furnished materials as above set forth, said claim was filed for record with the Recorder of Anchorage Recording Precinct, Third Division, Territory of Alaska, in Book 70 and page 286, of the City Records in which precinct, division and territory the above-described property was and is now situated. That said claim of lien was in the form described by statute and complied in all respects thereto; that a true copy of which notice of

claim of lien of plaintiff in intervention is attached hereto marked Exhibit "A," and by this reference incorporated herein.

V.

That the property on which said lien is claimed is as follows:

Lot Two (2), Block Thirty-seven "D" (37-D) of the South Addition to the City of Anchorage, Territory of Alaska, according to map and plat thereof on file in office of U. S. Commissioner, ex-Officio Precinct Recorder for Anchorage, Territory of Alaska.

VI.

That at all times herein mentioned, the defendants, Audrey Cutting and Russell Smith, were the owners of record or the reputed owners of the above-described premises upon which plaintiff in intervention claims a lien as aforesaid.

VII.

That in the preparation, filing and recording of the above-mentioned Notice of Claim of Lien the plaintiff in intervention as a necessary charge and expense in such preparation, filing and recording has paid the sum of \$17.25, which is a reasonable sum to be allowed plaintiff in intervention for the preparation, filing and recording of said Claim of Lien.

VIII.

That the plaintiff in intervention has made frequent demands upon the defendants herein for the

payment of the lien claim of \$2,717.86, and the defendants, and each of them, has failed and neglected and now fail and neglect to pay any part of said sum, and the balance now due and owing is in the sum of \$2,717.86.

IX.

That the complaint of the plaintiff in intervention herein has been filed within six (6) months of the expiration of the claim herein above mentioned.

X.

That in order to prosecute this action, plaintiff in intervention has been compelled to employ and has so employed an Attorney, the reasonable value of whose services is in the sum of \$350.00.

Wherefore, plaintiff prays judgment herein against defendants for the sum of \$2,717.86, together with interest thereon at the rate of 6% per annum from the 9th day of June, 1948;

2. The sum of \$17.25 for preparing and filing the above claim of lien;

3. The costs and disbursements of plaintiff in intervention herein had and expended including attorney's fee of \$350.00;

4. A decree ordering and adjudging that claim of plaintiff in intervention herein is a valid and sustaining lien upon the herein described premises, Lot 2, Block 37 "D," of the South Addition to the City of Anchorage, Territory of Alaska, and further adjudging that said lien be foreclosed and all of said

property be sold by the United States Marshal in the manner provided by law, and the proceeds thereof applied to the satisfaction of said judgment and the surplus, if any there be after deducting all costs and expenses of sale, be paid to the defendants;

5. For such other and further relief as to the Court may seem meet and just in the premises.

Second Cause of Action

I.

That the plaintiff, Alaskan Plumbing and Heating Company, Inc., is a Corporation organized and existing under and by virtue of the Laws of the Territory of Alaska; that said corporation has paid its 1948 license tax and has filed its financial statement due on the 1st day of March, 1948, and is qualified to do business in the Territory of Alaska.

II.

That on or about the 20th day of May, 1948, plaintiff entered into a verbal contract with Russell W. Smith and Audrey Cutting, defendants, for the furnishing of materials for the construction of a building located on Lot Two (2), Block Thirty-seven "D" (37-D) of the South Addition to the City of Anchorage, Territory of Alaska.

III.

That between the dates of May 21, 1948, and the 18th day of June, 1948, plaintiff in intervention furnished materials under the aforesaid contract of

the reasonable value of One Thousand Six Hundred, Eighty-five and no/100 (\$1,685.00) Dollars.

IV.

That in order to secure the payment of said sum of \$1,685.00, plaintiff in intervention prepared a Notice of Lien dated the 31st day of July, 1948, which claim contained a true statement of said plaintiff's demand and the amount thereof, and also the names of the persons who directed that such materials be furnished, to wit: Audrey Cutting and Russell Smith, giving the dates when said materials were furnished by it, and also containing a description of the property on which said lien was issued, sufficient for identification, as well as the names of the owner, or owners of record thereof, which said claim was duly verified by claimant and thereafter on the 3d day of August, 1948, and within ninety (90) days from the last day upon which plaintiff in intervention so furnished materials as above set forth, said claim was filed for record with the Recorder of Anchorage Recording Precinct, Third Division, Territory of Alaska, in Book 70, at page 310, of the City Records in which precinct, division and Territory the above-described property was and is now situated. That said claim of lien was in the form described by statute and complied in all respects thereto; that a true copy of which notice of claim of lien of plaintiff in intervention is attached hereto marked Exhibit "B" and by this reference incorporated herein.

V.

That the property on which said lien is claimed is as follows:

Lot Two (2), Block Thirty-seven "D" (37-D) of the South Addition to the City of Anchorage, Territory of Alaska, according to map and plat thereof on file in the office of U. S. Commissioner, ex-Officio Precinct Recorder for Anchorage, Territory of Alaska.

VI.

That at all times herein mentioned, the defendants, Audrey Cutting and Russell Smith, were the owners of record or the reputed owners of the above-described premises upon which plaintiff in intervention claims a lien as aforesaid.

VII.

That in the preparation, filing and recording of the above-mentioned Notice of Claim of Lien the plaintiff in intervention as a necessary charge and expense in such preparation, filing and recording has paid the sum of \$17.25, which is a reasonable sum to be allowed plaintiff in intervention for the preparation, filing and recording of said Claim of Lien.

VIII.

That the plaintiff in intervention has made frequent demands upon the defendants herein for the payment of the lien claim of \$1,685.00, and the defendants, and each of them has failed and neglected and now fail and neglect to pay any part of said

sum, and the balance now due and owing is in the sum of \$1,685.00.

IX.

That the complaint of the plaintiff in intervention herein has been filed within six (6) months of the expiration of the claim herein above mentioned.

That in order to prosecute this action, plaintiff in intervention has been compelled to employ and has so employed an attorney, the reasonable value of whose services is in the sum of \$350.00.

Wherefore, plaintiff prays judgment herein against defendants for the sum of \$1,685.00, together with interest thereon at the rate of 6% per annum from the 18th day of June, 1948;

2. The sum of \$17.25 for preparing and filing the above claim of lien;

3. The costs and disbursements of plaintiff in intervention herein had and expended including attorney's fee of \$350.00;

4. A decree ordering and adjudging that claim of plaintiff in intervention herein is a valid and sustaining lien upon the herein described premises, Lot 2, Block 37 "D" of the South Addition to the City of Anchorage, Territory of Alaska, and further adjudging that said lien be foreclosed and all of said property be sold by the United States Marshal in the manner provided by law, and the proceeds thereof applied to the satisfaction of said judgment and the surplus, if any there be, after deducting

all costs and expenses of said sale, be paid to the defendants;

5. For such other and further relief as to the Court may seem meet and just in the premises.

CUDDY & KAY,

By /s/ WENDELL P. KAY,

Of Attorneys for Plaintiffs in
Intervention.

Duly verified.

EXHIBIT "A"

KETCHIKAN SPRUCE MILLS, INC., a
Corporation,

Claimant,

vs.

AUDREY CUTTING, RUSSELL SMITH and
RALPH RUSSELL THOMAS,

Defendants.

CLAIM OF LIEN

Notice Is Hereby Given that the Ketchikan Spruce Mills, Inc., Claims a lien upon

Lot Two (2), Block Thirty-seven "D" (37-D)
of the South Addition to the City of Anchorage, Territory of Alaska,

for and on account of materials, expended upon said building; that the name of the owners, or reputed owners, of said property is Audrey Cutting,

Russell Smith and Sylvia A. Henderson, that the said materials were delivered upon the said property at the instance and request of the said Audrey Cutting and Russell Smith, between the 3rd day of May, 1948, and the 9th day of June, 1948, to be used in the construction, alterations or repair of the above-mentioned property; that ninety (90) days have not elapsed since the date of furnishing said materials on the property; that the amount claimant demands for said materials is as follows:

Materials furnished between May 3, 1948, and June 9, 1948, \$2,717.86.

That no part thereof has been paid, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets the sum of \$2,717.86, in which amount it claims a lien upon said property.

Dated at Anchorage, Alaska, this 19th day of July, 1948.

KETCHIKAN SPRUCE
MILLS, INC.,
a Corporation.

By /s/ HARRY GOUDCHAUX.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 9, 1948.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

COMPLAINT IN INTERVENTION

Comes now the plaintiff-in-intervention in the above-entitled causes of action, after leave of Court first had and obtained, and files this, its Complaint in Intervention, and for its first cause of action alleges:

I.

That the plaintiff-in-intervention, during all the dates and times hereinafter mentioned, was a partnership engaged in the manufacture of ready mix cement and ready mix cement blocks.

II.

That during all the times herein mentioned, the defendants-in-intervention, Ralph R. Thomas, Audrey Cutting, Russell W. Smith and Sylvia Henderson, a minor, were, and now are, the owners and reputed owners of the hereinafter described property, to wit:

Lot Two (2) of Block Thirty-seven "D" (37-D) of the South Addition to the original townsite of Anchorage, Alaska, according to the official map and plat thereof on file in the U. S. Commissioner's Office at Anchorage, Alaska; together with that certain one-story dwelling house located thereon.

III.

That the defendants-in-intervention, Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell, William Besser, Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, Co-Partners under the firm name and style of Kennedy Hardware, and Gene Brady, co-partners under the firm name and style of Brady's Floor Covering, and E. V. Fritts, William J. Wallace and Einer G. Nelson, co-partners under the firm name and style of Alaska Paint & Glass Co., and City Electric of Anchorage, Inc., a corporation, are lien claimants against the real property hereinbefore described, and have heretofore filed their complaints in the above-entitled causes of action, setting forth their respective claims.

IV.

That the defendants-in-intervention, Ketchikan Spruce Mills, Inc., a corporation, Alaskan Plumbing & Heating Company, a corporation, Ken Hinchey Co., Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, co-partners doing business under the firm name and style of Wolfe Hardware & Furniture, are lien claimants, having filed liens against the real property hereinabove described, for labor performed and/or materials furnished, and that plaintiff-in-intervention believes that the ends of justice would best be served by having a determination of the various interests of the parties plaintiff and defendants at one and the same hearing.

V.

That on and between the 5th day of May, 1948, and the 29th day of May, 1948, at the special instance and request of the defendant-in-intervention, Audrey Cutting, and upon her promise to pay the reasonable value of said services thereon, the plaintiff-in-intervention furnished building materials and performed labor in the construction of that certain dwelling house located on said property; that the building materials furnished and labor performed were actually used and performed in the construction of said dwelling house, and that the said building materials furnished and labor performed were of the reasonable worth and value of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars.

VI.

That the last date upon which said building materials were furnished and said labor performed, as aforesaid, was the 29th day of May, 1948, and that payment for the same, in the sum of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars became due thereon; that no part of said sum has ever been paid by the said defendant-in-intervention, and that the sum of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars is still due and owing to the plaintiff-in-intervention; that the building materials furnished and labor performed were satisfactory, so plaintiff-in-intervention believes and alleges, and no reason has ever been given for non-payment.

VII.

That the said defendant-in-intervention, Audrey Cutting, has often been requested to pay the same, but that the said defendant-in-intervention has failed and refused, and does now fail and refuse to pay the same or any part thereof, and that the sum of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars is now due and owing the plaintiff-in-intervention from the said defendant-in-intervention.

VIII.

That on or about the 12th day of August, 1948, and within ninety (90) days after the last day upon which plaintiff-in-intervention so furnished building materials and performed labor, for the said defendant-in-intervention, as aforesaid, the said plaintiff-in-intervention, for the purpose of maintaining, securing, protecting and perfecting its lien upon the said property above described, duly filed for record and caused to be recorded in the office of the United States Commissioner and ex-Officio Recorder for the Anchorage Recording Precinct, at Anchorage, Alaska, its statement of lien upon and against the above-described property and premises, which said lien was duly recorded in Book 70 of Precinct Records at Page 358; that six months have not elapsed since the date of recording of said statement of lien as aforesaid.

IX.

That said statement of lien so recorded was and is duly verified by the oath of Arthur F. Waldron,

one of the co-partners of the plaintiff-in-intervention, Anchorage Sand and Gravel Company, and contains a true statement of the demands and the amount thereof due said plaintiff-in-intervention, after deducting all just credits and offsets; a description of the property on which the lien is claimed sufficient for identification, being the same property heretofore in this complaint described; the name of the owners and reputed owners thereof; the dates when plaintiff-in-intervention furnished said building materials and performed labor, and all other material facts in relation thereto, a copy of which claim of lien is annexed to and made a part of this complaint, marked "Exhibit A," and by reference hereto incorporated herein and made a part hereof.

X.

That the sum of Twelve and 50/100 (\$12.50) Dollars is a reasonable sum to be allowed for the preparation and recording of said statement of lien. That it is necessary for this plaintiff-in-intervention to engage the services of an attorney to institute and to prosecute this action against the defendants-in-intervention.

XI.

That plaintiff-in-intervention is informed and believes, and alleges the fact to be, based upon such information and belief, that there are no prior or superior liens upon said property or premises, in favor of any person or persons, that take legal

precedence over the materials and labor claim of lien of this plaintiff-in-intervention.

Second Cause of Action

For a further and second cause of action, the plaintiff-in-intervention alleges and complaints against the defendants-in-intervention as follows:

I.

That during all the times herein mentioned, the plaintiff-in-intervention was a partnership engaged in the manufacture of ready mix cement and ready mix cement blocks, and that said plaintiff-in-intervention is the bona fide owner and holder of a written assignment of a Materialmen's Lien which said plaintiff-in-intervention purchased from Arthur F. Waldron, Roger N. Waldron and Jack Harrison, partners doing business under the firm name and style of Cinder Concrete Products Company, the assignor, which said assignor, during all the dates and times hereinafter mentioned, was a partnership engaged in the manufacture of cinder products and cinder blocks; and the said plaintiff-in-intervention brings this cause of action in its own name, as such owner and assignee of the above-mentioned assignment, which was made on the 5th day of October, 1948, and is ready to tender said assignment, which conveys to it the rights and titles of such cause of action.

II.

That during all the times herein mentioned, the defendants-in-intervention, Ralph R. Thomas, Audrey Cutting, Russell W. Smith and Sylvia A. Henderson, a minor, were, and are now, the owners and reputed owners of the hereinafter described property, to wit:

Lot Two (2) of Block Thirty-seven "D" (37-D) of the South Addition to the original townsite of Anchorage, Alaska, according to the official map and plat thereof on file in the U. S. Commissioner's Office at Anchorage, Alaska; together with that certain one-story dwelling house located thereon.

III.

That the defendants-in-intervention, Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell, William Besser, Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve, and Janice Reeve, co-partners under the firm name and style of Kennedy Hardware, and Gene Brady, co-partners under the firm name and style of Brady's Floor Covering, and E. V. Fritts, William J. Wallace and Einer G. Nelson, co-partners under the firm name and style of Alaska Paint & Glass Co., and City Electric of Anchorage, Inc., a corporation, are lien claimants against the real property hereinabove described, and have heretofore filed their complaints in the above-entitled causes of action, setting forth their respective claims.

IV.

That the defendants-in-intervention, Ketchikan Spruce Mills, Inc., a corporation, Alaskan Plumbing & Heating Company, a corporation, Ken Hinchey Co., Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, co-partners doing business under the firm name and style of Wolfe Hardware & Furniture, are lien claimants, having filed liens against the real property hereinabove described, for labor performed and/or materials furnished, and that plaintiff-in-intervention believes that the ends of justice would best be served by having a determination of the various interests of the parties plaintiff and defendants at one and the same hearing.

V.

That on and between the 10th day of May, 1948, and the 18th day of May, 1948, at the special instance and request of the defendants-in-intervention, Audrey Cutting, and upon her promise to pay the reasonable value of said services thereon, the plaintiff-in-intervention's assignor furnished building materials in the construction of that certain dwelling house located on said property; that the building materials furnished were actually used in the construction of said dwelling house, and that the said building materials furnished were of the reasonable worth and value of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars.

VI.

That the last date upon which said building materials were furnished, as aforesaid, was the 18th day of May, 1948, and that payment for the same, in the sum of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars became due thereon; that no part of said sum has ever been paid by the said defendant-in-intervention; and that the sum of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars is still due and owing to the plaintiff-in-intervention as assignee of said assignment aforesaid; that the building materials were satisfactory, so plaintiff-in-intervention believes and alleges, and no reason has ever been given for non-payment.

VII.

That the defendant-in-intervention, Audrey Cutting, has often been requested to pay the same, but that the said defendant-in-intervention has failed and refused, and does now fail and refuse to pay the same or any part thereof, and that the sum of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars is now due and owing the plaintiff-in-intervention, as assignee of said assignment aforesaid, from the said defendant-in-intervention.

VIII.

That on or about the 12th day of August, 1948, and within ninety (90) days after the last day upon which plaintiff-in-intervention's assignor so furnished building materials for the said defendant-in-intervention, as aforesaid, the said assignor, for the purpose of maintaining, securing, protecting

and perfecting its lien upon the said property above described, duly filed for record and caused to be recorded in the office of the United States Commissioner and ex-Officio Recorder for the Anchorage Recording Precinct, at Anchorage, Alaska, its statement of lien upon and against the above-described property and premises, which said lien was duly recorded in Book 70 of Precinct Records at Page 357; that six months have not elapsed since the date of recording of said statement of lien as aforesaid.

IX.

That said statement of lien so recorded was and is duly verified by Jack F. Harrison, one of the partners of the plaintiff-in-intervention's assignor, Cinder Concrete Products Company, and contains a true statement of demands and the amount thereof due said assignor, after deducting all just credits and offsets; a description of the property on which the lien is claimed sufficient for identification, being the same property heretofore in this cause of action described; the name of the owners and reputed owners thereof; the dates when plaintiff-in-intervention's assignor furnished said building materials, and all other material facts in relation thereto, a copy of which claim for lien is annexed to and made a part of this complaint, marked "Exhibit B," and by reference hereto incorporated herein and made a part hereof.

X.

That the sum of Twelve and 50/100 (\$12.50) Dollars is a reasonable sum to be allowed for the

preparation and recording of said statement of lien. That it is necessary for this plaintiff-in-intervention to engage the services of an attorney to institute and to prosecute this action against the defendants-in-intervention.

XI.

Plaintiff-in-intervention is informed and believes, and alleges the facts to be, based upon such information and belief, that there are no prior or superior liens upon said property or premises, in favor of any person or persons, that take legal precedence over the Materialmen's Lien above set forth.

Wherefore, plaintiff-in-intervention prays judgment against the defendants-in-intervention as follows:

1. Personal judgment on its first cause of action against the defendant-in-intervention, Audrey Cutting, for the sum of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from May 29, 1948; together with Twelve and 50/100 (\$12.50) Dollars for the preparation and recording of the statement of lien; together with a reasonable sum for attorney's fee, to be fixed by the Court, and for plaintiff-in-intervention's costs and disbursements in this cause of action incurred.

2. That the total amount so due to plaintiff-in-intervention on its first cause of action, from the defendant-in-intervention, Audrey Cutting, together

with plaintiff-in-intervention's costs, disbursements and attorney's fees, as aforesaid, be adjudged and decreed to be first, prior and superior liens upon all and every part of the property in this complaint mentioned and described, prior and superior to any right, claim of title or lien of the defendants-in-intervention herein, in or to said property or any part thereof, or of any person or persons claiming, or to claim under, by or through said defendants-in-intervention; that said property be sold under decree according to law and the practice of this Honorable Court, and that the moneys derived therefrom be applied to the payment of the amounts due to the plaintiff-in-intervention on its first cause of action, as hereinabove stated.

3. For such other and further relief as to the Court may seem just and equitable in the premises.

4. Personal judgment on its second cause of action against the defendant-in-intervention, Audrey Cutting, for the sum of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from May 18, 1948; together with Twelve and 50/100 (\$12.50) Dollars for the preparation and recording of the statement of lien; together with a reasonable sum for attorney's fee, to be fixed by the Court, and for plaintiff-in-intervention's costs and disbursements in this cause of action incurred.

5. That the total amount so due to plaintiff-in-

intervention on its second cause of action, from the defendant-in-intervention, Audrey Cutting, together with plaintiff-in-intervention's costs, disbursements and attorney's fees, as aforesaid, be adjudged and decreed to be first, prior and superior lien upon all and every part of the property in this complaint mentioned and described, prior and superior to any right, claim of title or lien of the defendants-in-intervention herein, in or to said property or any part thereof, or of any person or persons claiming, or to claim under, by or through said defendants-in-intervention; that said property be sold under decree according to law and the practice of this Honorable Court, and that the moneys derived therefrom be applied to the payment of the amounts due to the plaintiff-in-intervention on its second cause of action, as hereinabove stated.

6. For such other and further relief as to the Court may seem just and equitable in the premises.

ANCHORAGE SAND AND
GRAVEL COMPANY,

By /s/ ARTHUR F. WALDRON,
Co-partner,
Plaintiff-in-intervention.

By /s/ J. L. McCARREY, JR.,
Attorney for Plaintiff-in-
intervention.

Duly verified.

EXHIBIT "A"

ARTHUR F. WALDRON and JOSEPH A.
COLUMBUS, Co-partners Doing Business
Under the Firm Name and Style of ANCHOR-
AGE SAND AND GRAVEL COMPANY,
Plaintiffs,

vs.

AUDREY CUTTING and RALPH RUSSELL
THOMAS, RUSSELL SMITH and LOT 2,
BLOCK 37 "D," SOUTH ADDITION,
Defendants.

MATERIALS AND LABOR CLAIM OF LIEN

Notice Is Hereby Given that Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand & Gravel Company, Claim a labor and materialmen's lien upon that certain real property and one-story dwelling house situate, lying and being in the Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to wit:

Lot Two (2) of Block Thirty-seven "D" (37-D) of the South Addition to the original townsite of Anchorage, Alaska, according to the official map and plat thereof on file in the U. S. Commissioner's Office at Anchorage, Alaska, together with that certain one-story dwelling house located thereon.

That said claim for lien is for labor and services performed, and materials furnished, in and about the construction, either in whole or in part, of the said dwelling house on said property; that the names of the owners or reputed owners of said property are Audrey Cutting and Ralph Russell Thomas; that said labor and services performed, and materials furnished, were ordered performed and furnished upon and to said property on and between the 5th day of May, 1948, and the 29th day of May, 1948, at the request of Audrey Cutting, for whom said labor and services were performed and said materials furnished; that the amount claimants demand for said labor and materials, after deducting all just credits and off-sets, is the sum of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars; that no part of said sum has been paid, and that there is now due, owing and unpaid said sum of Three Hundred Seventy-seven and 61/100 (\$377.61) Dollars, for which claimants claim a lien against the hereinabove-described property; that ninety (90) days have not elapsed since claimants ceased to furnish materials and perform labor and services, as aforesaid.

ANCHORAGE SAND &
GRAVEL COMPANY,

By /s/ ARTHUR F. WALDRON,
Co-partner.

Duly verified.

“EXHIBIT B”

ARTHUR F. WALDRON, ROGER N. WALDRON and JACK HARRISON, Partners Doing Business Under the Firm Name and Style of CINDER CONCRETE PRODUCTS COMPANY,

Plaintiffs,

vs.

AUDREY CUTTING and RALPH RUSSELL THOMAS, RUSSELL SMITH and LOT 2, BLOCK 37 “D” SOUTH ADDITION,

Defendants.

MATERIALMEN’S LIEN

Notice Is Hereby Given that Arthur F. Waldron, Roger N. Waldron and Jack Harrison, partners doing business under the firm name and style of Cinder Concrete Products Company, of Anchorage, Alaska, claim a materialmen’s lien upon that certain real property and one-story dwelling house situate, lying and being in the Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to wit:

Lot two (2) of Block Thirty-seven “D” (37-D) of the South Addition to the original townsite of Anchorage, Alaska, according to the official map and plat thereof on file in the U. S. Commissioner’s office at Anchorage, Alaska; together with that certain one-story dwelling house located thereon.

That said claim for lien is for materials furnished, in and about the construction, either in whole or in part, of said dwelling house on said property; that the names of the owners or reputed owners of said property are Audrey Cutting and Ralph Russell Thomas; that said materials furnished, were ordered furnished upon and to said property on and between the 10th day of May, 1948, and the 18th day of May, 1948, at the request of Audrey Cutting, for whom said materials were furnished; that the amount claimants demand for said materials, after deducting all just credits and off-sets, is the sum of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars; that no part of said sum has been paid, and that there is now due, and owing and unpaid said sum of Six Hundred Twenty-eight and 27/100 (\$628.27) Dollars, for which claimants claim a lien against the hereinabove-described property; that ninety (90) days have not elapsed since claimants ceased to furnish materials as aforesaid.

CINDER CONCRETE
PRODUCTS COMPANY,

By /s/ JACK F. HARRISON,
Partner.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1948.

[Title of District Court and Cause.]

No. A-5088.

ORDER ALLOWING INTERVENTION

This cause coming on before the above-entitled court on the 26th day of November, 1948, at Anchorage, Alaska, upon the motion of Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, co-partners under the firm name and style of Kennedy Hardware, and all Plaintiffs and Plaintiffs in Intervention consenting thereto, by their respective attorneys, and a copy of the Complaint in Intervention of said proposed Intervenor, being attached hereto and duly considered, Now Therefore:

It Is Hereby Ordered, that said Complaint in Intervention may be filed herein.

Dated at Anchorage, Alaska, November 26th, 1948.

/s/ GEORGE W. FOLTA,
District Judge.

Approved:

/s/ J. L. McCARREY, JR.,
Attorney for Anchorage Sand
and Gravel Company.

/s/ WENDELL P. KAY,
Attorney for Ketchikan Spruce Mills, Inc., and
Alaskan Plumbing and Heating Company, Inc.

/s/ HAROLD J. BUTCHER,
Attorney for Audrey Cutting,
Defendant.

/s/ JOHN H. DIMOND,
Attorney for Trustee for Rus-
sell W. Smith, Bankrupt.

Entered Nov. 27, 1948.

[Endorsed]: Filed November 27, 1948.

[Title of District Court and Cause.]

No. A-5088.

COMPLAINT IN INTERVENTION

Come now Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, co-partners under the firm name and style of Kennedy Hardware, by leave of Court first had and obtained, and for cause of action, allege:

I.

That at all times hereinafter mentioned, the plaintiffs in Intervention, Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, were co-partners engaged in the hardware business at Anchorage, Alaska, under the firm name and style of Kennedy Hardware.

II.

That all the Plaintiffs and Plaintiffs in Inter-

vention in the above-entitled action have brought their respective actions to foreclose liens for material furnished or labor performed in the constructing of a certain residence building on the premises described as follows:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska.

III.

That during the times hereinafter mentioned, the defendant, Ralph Russell Thomas, was the owner of the premises described in the foregoing Paragraph.

IV.

That during all times hereinafter mentioned, the defendant, Audrey Cutting, was and ever since has been and now is the reputed owner of the above-described premises and has or claims to have some right, title or interest therein, the nature of which is unknown to these Plaintiffs in Intervention, and is therefore not stated, but which Plaintiffs in Intervention allege is inferior and subject to the lien of Plaintiffs in Intervention hereinafter set forth.

V.

That the Defendants in Intervention, Sylvia A. Henderson, a minor, has or claims to have some right, title or interest in the premises above de-

scribed, the nature of which is unknown to these Plaintiffs in Intervention, and therefore not stated, but which Plaintiffs in Intervention allege is subject to their lien hereinafter set forth.

VI.

That during all the times hereinafter in the next paragraph of this cause of action mentioned, the defendant, Russell W. Smith, had charge of and was engaged in the construction of a residence building on the premises hereinbefore described under a contract with the defendant, Audrey Cutting; that said construction was with the knowledge, consent and at the instance of the defendants, Audrey Cutting and Ralph Russell Thomas.

VII.

That during the period beginning May 20, 1948, and ending June 19, 1948, these Plaintiffs in Intervention furnished material for the construction of the aforesaid building for and at the request of said Russell W. Smith at the agreed price and of the reasonable value of One Hundred Twelve and 95/100 Dollars (\$112.95); that said material consisted of nails, bolts, spikes, washers, butts, locks and locksets, mastic, sash-lifts, sash-fast, key-plaster, door-stops and hinges, all of which was used in the actual construction of said building and became a permanent part thereof.

VII.

That the said Russell W. Smith has not paid to

Plaintiffs in Intervention the aforesaid prices and reasonable value of said material, nor any part thereof, although frequently requested so to do, and the same is now due and owing from said defendant to Plaintiffs in Intervention.

IX.

That the whole of the real property hereinbefore described is required for the convenient use and occupation of the residence building hereinbefore mentioned.

X.

That by reason of the premises, Plaintiffs in Intervention acquired a lien upon the premises hereinbefore described for the sum due them as aforesaid, and for the purpose of securing and perfecting the said lien, Plaintiffs in Intervention on the 2nd day of August, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of their demand, after deducting all charges, credits and offsets duly verified with the name of the owner and reputed owner and also the name of the person to whom they furnished the material and also a description of the property to be charged with said lien, sufficient for identification. That said claim of lien was duly recorded in Book 70 on Page 304 of the City Records of said recording precinct; that a true and correct copy of said claim of lien is hereunto annexed, marked "Exhibit A" and made a part of this Complaint.

That Plaintiffs in Intervention paid for filing

and recording said claim of lien, the sum of Four and 05/100 Dollars (\$4.05).

That the sum of One Hundred Dollars (\$100.00) is a reasonable amount to be allowed by the Court as an attorney fee for the prosecution of this action.

XI.

That on the 16th day of July, 1948, Russell W. Smith, defendant in the first above-entitled action, was adjudged a bankrupt by order of the above-entitled Court, and thereafter in said bankruptcy proceeding, Herald E. Stringer was duly appointed trustee of the estate of said bankrupt, and is now the duly appointed and qualified trustee of said estate.

That on or about the 24th day of July, 1948, an action was commenced in the above-entitled Court, entitled, Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell, and William Besser vs. Ralph R. Thomas, Audrey Cutting and Russell W. Smith, No. A-5087.

That said action was and is an action to foreclose certain claimed liens of the plaintiffs' therein, against the premises hereinbefore described, on account of labor performed in the construction of the residence building referred to and described in Paragraph II of this Complaint in Intervention.

That the said Herald Stringer, as Trustee for the estate of the said Russell W. Smith, has by leave of court filed a Complaint in Intervention in said action No. A-5087, wherein and whereby prays for the foreclosure of an alleged contractor's lien

claimed by the said Russell W. Smith against the aforesaid building and premises.

That the said action No. 5087 has been by order of this Court consolidated for trial with said cause No. 5088, the above-entitled action in which this Complaint in Intervention is filed.

That the said claimed lien of the said Russell W. Smith is subordinate and subject to the lien of these Plaintiffs in Intervention.

Wherefore Plaintiffs in Intervention Pray:

1. For a decree of this Court adjudging that they are entitled to recover from the said Russell W. Smith the sum of One Hundred and Twelve Dollars and Ninety-five Cents (\$112.95) together with interest thereon at the rate of six per cent per annum from June 19th, 1948, together with the sum of Four Dollars and Five Cents (\$4.05) for filing and recording their said claim of lien and the sum of One Hundred Dollars (\$100.00) attorney fee.

2. That said decree adjudge that Plaintiffs in Intervention have a lien on the premises hereinbefore described including the residence building thereon for said amounts stated in the preceding paragraph, and that all of said premises be sold according to law and the proceeds of said sale, after satisfaction of judgments for any valid prior liens, be applied to the payment of the sum found due to these Plaintiffs in Intervention.

3. For such other and further relief as to the Court may seem equitable in the premises.

GEORGE B. GRIGSBY,
Attorney for Plaintiffs
in Intervention.

A true copy.

Duly verified.

“EXHIBIT A”

TED VAN THIEL, PATSY VAN THIEL, E. P.
CARTEE, JEAN CARTEE, R. C. REEVE,
and JANICE REEVE, Co-partners Under
the Firm Name and Style of KENNEDY
HARDWARE,

Claimants,

vs.

AUDREY CUTTING, RUSSELL W. SMITH,
RALPH RUSSELL THOMAS and LOT
TWO (2) IN BLOCK THIRTY-SEVEN D
(37-D) OF THE SOUTH ADDITION TO
THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimants claim a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37 D)
of the South Addition to the City of Anchorage,

Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

The owners and reputed owners of the above-described premises are Ralph Russell Thomas and Audrey Cutting.

The residence building now on said premises was constructed by the above-named Russell W. Smith under a contract with the said Audrey Cutting, with the knowledge and consent of the said Russell Thomas, and was under construction during all the times hereinafter mentioned.

This lien is claimed for material furnished for the construction of said building by the above-named claimants, during the period beginning May 20th, 1948, and ending June 19th, 1948, and ending on the latter date, consisting of nails, bolts, spikes, washers, butts, locks and locksets, mastic, sash-lifts, sash-fasts, key-plaster, door-stops and hinges, all of which was used in the actual construction of said building and became a part thereof.

That said material was furnished for and to and at the request of the said Russell W. Smith, at the agreed price and reasonable value of One Hundred and Twelve Dollars and Ninety-five Cents (\$112.95), which he promised and agreed to pay, and there is now due and owing to the claimants from the said Russell W. Smith, after deducting all just credits and offsets, said sum of One Hundred and Twelve

Dollars and Ninety-five Cents, for which sum these claimants claim a lien on the aforesaid premises.

/s/ TED VAN THIEL.

Duly verified.

[Endorsed]: Filed November 27, 1948.

[Title of District Court and Cause.]

No. A-5088.

COMPLAINT IN INTERVENTION

Come now Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, co-partners under the firm name and style of Kennedy Hardware, by leave of Court first had and obtained and for cause of action allege:

I.

That at all times hereinafter mentioned, the Plaintiffs in Intervention, Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, were co-partners engaged in the hardware business at Anchorage, Alaska, under the firm name and style of Kennedy Hardware.

II.

That all the Plaintiffs and Plaintiffs in Intervention in the above-entitled action have brought their respective actions to foreclose liens for material furnished or labor performed in the con-

structing of a certain residence building on the premises described as follows:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska.

III.

That during the times hereinafter mentioned, the defendant, Ralph Russell Thomas, was the owner of the premises described in the foregoing Paragraph.

IV.

That during all times hereinafter mentioned, the defendant, Audrey Cutting, was and ever since has been and now is the reputed owner of the above-described premises and has or claims to have some right, title or interest therein, the nature of which is unknown to these Plaintiffs in Intervention, and is therefore not stated, but which Plaintiffs in Intervention allege is inferior and subject to the lien of Plaintiffs in Intervention hereinafter set forth.

V.

That the Defendant in Intervention, Sylvia A. Henderson, a minor, has or claims to have some right, title or interest in the premises above described, the nature of which is unknown to these Plaintiffs in Intervention, and therefore not stated, but which Plaintiffs in Intervention allege is subject to their lien hereinafter set forth.

VI.

That during all the times hereinafter in the next paragraph of this cause of action mentioned, the defendant, Russell W. Smith, had charge of and was engaged in the construction of a residence building on the premises hereinbefore described under a contract with the defendant, Audrey Cutting; that said construction was with the knowledge, consent and at the instance of the defendants, Audrey Cutting and Ralph Russell Thomas.

VII.

That during the period beginning May 20, 1948, and ending June 19, 1948, these Plaintiffs in Intervention furnished material for the construction of the aforesaid building for and at the request of said Russell W. Smith at the agreed price and of the reasonable value of One Hundred Twelve and 95/100 Dollars (\$112.95); that said material consisted of nails, bolts, spikes, washers, butts, locks and locksets, mastic, sash-lifts, sash-fast, key-plaster, door-stops and hinges, all of which was used in the actual construction of said building and became a permanent part thereof.

VIII.

That the said Russell W. Smith has not paid to Plaintiffs in Intervention the aforesaid prices and reasonable value of said material, nor any part thereof, although frequently requested so to do, and the same is now due and owing from said defendant to Plaintiffs in Intervention.

IX.

That the whole of the real property hereinbefore described is required for the convenient use and occupation of the residence building hereinbefore mentioned.

X.

That by reason of the premises, Plaintiffs in Intervention acquired a lien upon the premises hereinbefore described for the sum due them as aforesaid, and for the purpose of securing and perfecting the said lien, Plaintiffs in Intervention on the 2nd day of August, 1948, filed for record in the office of the Recorder for the Anchorage Recording Precinct, Territory of Alaska, a claim containing a true statement of their demand, after deducting all charges, credits and offsets duly verified with the name of the owner and reputed owner and also the name of the person to whom they furnished the material and also a description of the property to be charged with said lien, sufficient for identification. That said claim of lien was duly recorded in Book 70 on Page 304 of the City records of said recording precinct; that a true and correct copy of said claim of lien is hereunto annexed, marked "Exhibit A" and made a part of this Complaint.

That Plaintiffs in Intervention paid for filing and recording said claim of lien, the sum of Four and 05/100 Dollars (\$4.05).

That the sum of One Hundred Dollars (\$100.00) is a reasonable amount to be allowed by the Court as an attorney fee for the prosecution of this action.

XI.

That on the 16th day of July, 1948, Russell W. Smith, defendant in the first above-entitled action, was adjudged a bankrupt by order of the above-entitled Court, and thereafter in said bankruptcy proceedings, Herald E. Stringer was duly appointed trustee of the estate of said bankrupt, and is now the duly appointed and qualified trustee of said estate.

That on or about the 24th day of July, 1948, an action was commenced in the above-entitled Court, entitled, Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell, and William Besser vs. Ralph R. Thomas, Audrey Cutting and Russell W. Smith, No. A-5087.

That said action was and is an action to foreclose certain claimed liens of the plaintiffs' therein, against the premises hereinbefore described, on account of labor performed in the construction of the residence building referred to and described in Paragraph II of this Complaint in Intervention.

That the said Herald Stringer, as Trustee for the estate of the said Russell W. Smith, has by leave of court filed a Complaint in Intervention in said action No. A-5087, wherein and whereby prays for the foreclosure of an alleged contractor's lien claimed by the said Russell W. Smith against the aforesaid building and premises.

That the said action No. 5087 has been by order of this Court, consolidated for trial with said cause No. 5088, the above-entitled action in which this complaint in intervention is filed.

That the said claimed lien of the said Russell W. Smith is subordinate and subject to the lien of these Plaintiffs in Intervention.

Wherefore Plaintiffs in Intervention Pray:

1. For a decree of this Court adjudging that they are entitled to recover from the said Russell W. Smith the sum of One Hundred and Twelve Dollars and Ninety-five Cents (\$112.95) together with interest thereon at the rate of six per cent per annum from June 19th, 1948, together with the sum of Four Dollars and Five Cents (\$4.05) for filing and recording their said claim of lien and the sum of One Hundred Dollars (\$100.00) attorney fee.

2. That said decree adjudge that Plaintiffs in Intervention have a lien on the premises hereinbefore described including the residence building thereon for said amounts stated in the preceding paragraph, and that all of said premises be sold according to law and the proceeds of said sale, after satisfaction of judgments for any valid prior liens, be applied to the payment of the sum found due to these Plaintiffs in Intervention.

3. For such other and further relief as to the Court may seem equitable in the premises.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiffs
in Intervention.

Duly verified.

“EXHIBIT A”

TED VAN THIEL, PATSY VAN THIEL, E. P. CARTEE, JEAN CARTEE, R. C. REEVE and JANICE REEVE, Co-partners Under the Firm Name and Style of KENNEDY HARDWARE,

Claimants,

vs.

AUDREY CUTTING, RUSSELL W. SMITH, RALPH RUSSELL THOMAS and LOT TWO (2) IN BLOCK THIRTY-SEVEN D (37-D) OF THE SOUTH ADDITION TO THE TOWNSITE OF ANCHORAGE.

CLAIM OF LIEN

Notice is hereby given that the above-named claimants claim a lien upon the following described premises situate in the City of Anchorage, Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska, together with the residence building thereon situated.

The owners and reputed owners of the above-described premises are Ralph Russell Thomas and Audrey Cutting.

The residence building now on said premises was constructed by the above-named Russell W. Smith under a contract with the said Audrey Cutting, with the knowledge and consent of the said Russell Thomas, and was under construction during all the times hereinafter mentioned.

This lien is claimed for material furnished for the construction of said building by the above-named claimants, during the period beginning May 20th, 1948, and ending June 19th, 1948, and ending on the latter date, consisting of nails, bolts, spikes, washers, butts, locks and locksets, mastic, sash-lift, sash-fast, key-plaster, doorstops and hinges, all of which was used in the actual construction of said building and became a part thereof.

That said material was furnished for and to and at the request of the said Russell W. Smith, at the agreed price and reasonable value of One Hundred and Twelve Dollars and Ninety-five Cents (\$112.95) which he promised and agreed to pay, and there is now due and owing to the claimants from the said Russell W. Smith, after deducting all just credits and offsets, said sum of One Hundred and Twelve Dollars and Ninety-five cents, for which sum these claimants claim a lien on the aforesaid premises.

/s/ TED VAN THIEL.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 27, 1948.

MARSHAL'S RETURN

United States of America, Third Division,
Territory of Alaska

I hereby certify that I received the within Complaint and Intervention entitled:

TED VAN THIEL, PATSY VAN THIEL, E. P. CARTEE, JEAN CARTEE, R. C. REEVE, and JANICE REEVE, Co-partners, Under the Firm Name and Style of KENNEDY HARDWARE and GENE BRADY, Co-partners Under the Firm Name and Style of BRADY'S FLOOR COVERING, and E. V. FRITTS, WILLIAM J. WALLACE, and EINER G. NELSON, Co-partners Under the Firm Name and Style of ALASKA PAINT AND GLASS CO., and CITY ELECTRIC OF ANCHORAGE, INC., a Corporation,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

On the day of November, 1948; and that I made service on Ralph R. Thomas at Anchorage, Alaska, by leaving with him a copy of said Complaint and Intervention, duly certified to be a true

and correct copy by Wendell P. Kay, Attorney for Plaintiff in Intervention.

JAMES H. PATTERSON,
U. S. Marshal.

I hereby Certify that the within Order to Show Cause was not served due to the fact that It had expired.

Dated at Anchorage, Alaska, this 14th day of December, 1948.

JAMES H. PATTERSON,
U. S. Marshal.

By /s/ HERBERT D. HOFF,
Deputy.

[Endorsed]: Filed December 22, 1948.

[Title of District Court and Cause.]

No. A-5088.

ANSWER TO COMPLAINT IN
INTERVENTION

Comes now Audrey Cutting, and answering the complaint in intervention of the plaintiffs, admits and denies as follows:

I.

The defendant herein answering denies all of the allegations of the complaint filed by plaintiffs in intervention except that the defendant, R. W. Smith,

entered into a contract with the defendant herein, Audrey Cutting, for the construction of a residence.

Affirmative Defense

That by virtue of said contract, the said Russell W. Smith was an independent contractor and that the plaintiff in intervention had no lien rights against the property of the defendant herein and that defendant made no contract with the plaintiff in intervention inconsistent with said independent contract.

Wherefore, defendant prays that plaintiffs in intervention take nothing by their complaint and that it be dismissed with its costs.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed December 30, 1948.

[Title of District Court and Cause.]

No. A-5088.

**ANSWER TO COMPLAINT IN
INTERVENTION**

Comes now the defendant, Audrey Cutting, and answering for herself and on behalf of her minor daughter, Sylvia A. Henderson, admits and denies as follows:

I.

Denies each and every allegation in said complaint in intervention which have not previously been admitted or denied in the defendants' previous answer to the original complaint.

Wherefore, defendant prays that plaintiffs take nothing by their complaint in intervention and that they be hence dismissed with costs.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed December 30, 1948.

[Title of District Court and Causes.]

No. A-5087-5088.

ANSWER AND CROSS-COMPLAINT

Comes now Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, co-partners doing business under the firm name and style of Wolfe Hardware and Furniture, hereinafter known as Wolfe Hardware, of the above-named defendants and appearing for themselves alone and not for their co-defendants or any of the other parties in this action, in answer to the first cause of action of the complaint in intervention of the intervening plaintiffs, admits, denies and alleges as follows:

I.

Except as hereinafter set forth, defendant Wolfe Hardware admits the allegations of the first, second, third and fourth paragraphs of the first cause of action of the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners, doing business under the firm name and style of Anchorage Sand and Gravel Company.

II.

Defendant Wolfe Hardware has no knowledge or information sufficient to form a belief concerning the allegations of the fifth, sixth and seventh paragraphs of the first cause of action of the complaint in intervention above described, and for that reason denies each and all the allegations of such paragraphs.

III.

Defendant Wolfe Hardware has no knowledge or information sufficient to form a belief concerning the allegations of the eighth paragraph of the first cause of action of the complaint in intervention above described, and for that reason denies all the allegations of such paragraph, except as to the allegation concerning the filing and recording of the lien claim mentioned in said eighth paragraph, at book 70 of Precinct Records, on page 358 thereof, which allegation is admitted by the defendant Wolfe Hardware.

IV.

Wolfe Hardware has no knowledge or information concerning the allegations of the ninth and tenth

paragraphs of the first cause of action of the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners, doing business under the firm name and style of Anchorage Sand & Gravel Company, and for that reason denies each and all of such allegations.

V.

Wolfe Hardware denies each and all the allegations of the 11th paragraph of the first cause of action of the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners doing business under the firm name and style of Anchorage Sand & Gravel Company.

By way of Answer to the second cause of action of the complaint in intervention of Arthur F. Waldron and Joseph A. Columbus, co-partners, doing business under the firm name and style of Anchorage Sand & Gravel Company, Wolfe Hardware admits, denies and alleges as follows:

I.

Wolfe Hardware admits the allegations of the first paragraph of the second cause of action of the complaint in intervention except the allegations concerning an alleged assignment to the plaintiff in intervention from the co-partners doing business as Concrete Products Company and as to such allegations, Wolfe Hardware has no knowledge or information sufficient to form a belief and for that reason denies the same.

II.

Except as hereinafter set forth, Wolfe Hardware admits the allegations of the second, third, and fourth paragraphs of the second cause of action of the complaint in intervention.

III.

Wolfe Hardware has no knowledge or information concerning the allegations of the fifth, sixth and seventh paragraphs of the second cause of action of the complaint in intervention, and for that reason denies each and all the allegations thereof.

IV.

Wolfe Hardware denies the allegations of the eighth paragraph of the second cause of action of the complaint in intervention except the allegations concerning the filing and recording of the claim of lien mentioned in such paragraph, which allegations are admitted by the defendant Wolfe Hardware.

V.

Wolfe Hardware has no knowledge or information concerning the allegations of the ninth or tenth paragraphs of the second cause of action of the complaint in intervention and for that reason denies each and all of such allegations.

VI.

Wolfe Hardware denies all the allegations of the eleventh paragraph of the second cause of action of the complaint in intervention.

As a further answer to the complaint in intervention and by way of cross-complaint thereto, answering defendants Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, known herein as Wolfe Hardware, allege as follows:

I.

Defendants Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, are and at all times mentioned in this answer have been co-partners doing business at Anchorage, Alaska, under the firm name and style of Wolfe Hardware and Furniture, and are referred to in this answer and cross-complaint as Wolfe Hardware.

II.

The defendant Ralph R. Thomas is, and at all times mentioned in this answer was, one and the same person as Ralph Russell Thomas.

III.

Sylvia A. Henderson, as the defendant Wolfe Hardware believes, and so alleges the fact to be, is and at all times mentioned in this action has been, a minor.

IV.

That Ted Van Thiel, Patsy Van Thiel, E. P. Cartee, Jean Cartee, R. C. Reeve and Janice Reeve, a co-partnership, doing business as Kennedy Hardware, and Gene Brady, are and at all times mentioned in this complaint have been, co-partners, doing business at Anchorage, Alaska, under the firm name and style of Brady's Floor Covering.

V.

That E. V. Fritts, William J. Wallace, and Einer G. Nelson are and at all times concerned in this action, have been co-partners, doing business at Anchorage, Alaska, under the firm name and style of Alaska Paint and Glass Company.

VI.

That the City Electric of Anchorage, Inc., is, and at all times concerned in this action, has been a corporation organized and existing under and by virtue of the laws of the Territory of Alaska.

VII.

That Arthur F. Waldron and Joseph A. Columbus are and at all times concerned in this action have been, co-partners doing business at Anchorage, Alaska, under the firm name and style of Anchorage Sand & Gravel Company.

VIII.

That Arthur F. Waldron, Roger N. Waldron and Jack Harrison are, and at all times mentioned in this answer have been, co-partners doing business at Anchorage, Alaska, under the firm name and style of Cinder Concrete Products Company.

IX.

That Ketchikan Spruce Mills, Inc., is, and at all times mentioned in this answer has been a corporation.

X.

That Alaskan Plumbing and Heating Company, Inc., is and at all times mentioned in this answer has been, a Corporation.

XI.

That at all times concerned in this action Ken Hinchey Company has been the trade name used by Ken Hinchey and Nadine Hinchey, co-partners, doing business at Anchorage, Alaska, under that name.

XII.

That at the time Wolfe Hardware furnished materials as hereinafter set forth, the defendant, Ralph Russell Thomas, was the record owner of certain real property located in the City of Anchorage, Alaska, and more particularly described as follows:

Lot 2, Block Thirty-seven "D" (37-D) of the South Addition to the townsite of Anchorage, Alaska, according to the map and plat of the Welch subdivision, which map and plat is on file and of record in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and including certain buildings constructed thereon, as hereinafter more fully set forth.

XIII.

That since Wolfe Hardware ceased to furnish

materials for construction on the above-described property, a Deed has been recorded at Book seventy-one (71) of the City Records of the Anchorage Recording Precinct, at page twenty-one (21) thereof, which purports to have been executed on the 30th day of November, 1946, and which purports to convey the above-described property from Ralph R. Thomas to Sylvia A. Henderson, and that Sylvia A. Henderson is now the record owner of such property and that such property is the subject of this action.

XIV.

That during all times concerned in this action, Audrey Cutting has been the purported owner of the property which is the subject of this action and that defendant Audrey Cutting has or may have some interest in such property but that the nature of such interest if in fact Audrey Cutting has any interest in the property, is unknown to Wolfe Hardware.

XV.

That prior to the date upon which the Wolfe Hardware furnished any materials or labor for the construction of the building upon the real property above described, defendants Sylvia A. Henderson or Audrey Cutting or Ralph Russell Thomas, also known as Ralph R. Thomas or one or more or all of such parties, entered into a contract with the defendant Russell W. Smith, the date and the exact terms of such contract being unknown to the answering defendants. That by the terms of such

contract, the defendant, Russell W. Smith, was engaged as a general contractor for the purpose of constructing a dwelling house for the defendants, Audrey Cutting or Sylvia A. Henderson or Ralph R. Thomas, also known as Ralph Russell Thomas, or one or more or all of them, upon the real property and premises above described and which is the subject of this action.

XVI.

That on or about the third day of May, 1948, Wolfe Hardware was engaged by the defendant, Russell W. Smith, as general contractor, to furnish certain goods, wares, merchandise and supplies to be used in the construction of the building upon the above-described real property and that between the third day of May, 1948, and the 10th day of June, 1948, Wolfe Hardware, at the special instance and request of Russell W. Smith, furnished certain goods, wares and merchandise and materials for the construction of such building and that such goods, wares, merchandise and materials were actually used and expended upon the above-described real property and in the construction of such building.

XVII.

That the goods, wares, merchandise and materials furnished by Wolfe Hardware in the construction of the building upon the property above described were of the reasonable and agreed value of \$199.80 in lawful money of the United States of America.

XVIII.

That no part of the said sum of \$199.80 has been paid and that there is now due, owing and unpaid to Wolfe Hardware from the defendant, Russell W. Smith, and the defendants, Audrey Cutting, Sylvia A. Henderson and Ralph Russell Thomas, also known as Ralph R. Thomas, the sum of \$199.80, after deducting all just credits and offsets.

XIX.

That demand has frequently been made by Wolfe Hardware for payment of the amount due in the sum of \$199.80 as above set forth, but that no payment thereon has been made and that there is now due and owing to Wolfe Hardware by reason of such goods, wares, merchandise and materials, and labor furnished in the construction of the building upon the real estate above described, the sum of \$199.80, together with interest on that sum at the rate of 6% per annum from the 10th day of June, 1948, until paid.

XX.

That the 10th day of June, 1948, was the last day upon which Wolfe Hardware furnished any materials, or labor for the construction of the building upon the above-described real property.

XXI.

That on the 13th day of August, 1948, and within 90 days after the last date upon which Wolfe Hardware so furnished any goods, wares, merchandise

and materials or labor as aforesaid, the said Wolfe Hardware, for the purpose of maintaining, securing and protecting its lien upon the real property above described, duly filed for record and caused to be recorded in the office of the United States Commissioner and ex-Officio Recorder for the Anchorage Recording Precinct, at Anchorage, Alaska, its statement of claim of lien upon and against the above-described premises and property which said lien was duly recorded in Book 71 of the City Records of such precinct at page 4. That a copy of such lien is hereto attached as Exhibit W and by reference is made a part hereof to the same extent as though set out in full.

XXII.

That six months have not elapsed since the date of recording the statement of claim of lien, of Wolfe Hardware as aforesaid.

XXIII.

That such claim of lien so recorded was and is duly verified by the oath of Ray Wolfe, one of the partners of the partnership, doing business as Wolfe Hardware and Furniture Company, and contains a true statement of the demands and the amount thereof due to the said Wolfe Hardware after deducting all just credits and offsets, with the name of the person who engaged the said Wolfe Hardware to furnish the goods, wares and merchandise and materials of labor, as aforesaid. That such statement contains a description of the property on

which the lien is claimed, sufficient for identification being the same property heretofore described herein and sets forth the name of the owner or reputed owner thereof and the dates when Wolfe Hardware furnished the materials, goods, wares, merchandise and supplies, including the last day thereof.

XXIV.

That the plaintiff in this action and each of the defendants therein, have or claim to have some right, interest, claim, demand or lien in, to or upon the premises and property above described, but that any such right, title, interest, claim, demand or lien is entirely secondary, subordinate and inferior to the lien of the said Wolfe Hardware as herein set forth.

XXV.

That the sum of \$13.60 is a reasonable sum to be allowed the answering defendants for the preparation and recording of their statement of lien.

XXVI.

That the sum of \$150.00 is a reasonable sum to be allowed to the answering defendants for and as their attorney's fees in this action.

Wherefore, having fully answered the complaint in intervention filed by Arthur F. Waldron and Joseph A. Columbus, co-partners, doing business under the firm name and style of Anchorage Sand and Gravel Company, the defendants, Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and

Ed Wilholth, co-partners, doing business under the firm name and style of Wolfe Hardware and Furniture, pray for judgment in this matter as follows:

1. That the plaintiffs in intervention may take nothing by their complaint in intervention.

2. That the claim of lien filed by the defendants, Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, co-partners, doing business under the firm name and style of Wolfe Hardware and Furniture Store, may be declared to be a first, prior and paramount lien against the real property which is the subject of this action and more particularly described as:

Lot 2, Block Thirty-seven "D" (37-D) of the South Addition to the townsite of Anchorage, Alaska, according to the map and plat of the Welch subdivision which map and plat is on file and of record in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and including particularly, that certain dwelling house located thereon.

3. That plaintiffs' lien against the premises which are the subject of this action and above described may be foreclosed and that such property may be sold in the manner provided by law and according to the practice of this court, and from

the proceeds of such sale the lien of the defendants, Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe and Ed Wilholth, co-partners, doing business under the firm name and style of Wolfe Hardware and Furniture Company, may be paid, together with the costs of preparation and recording of such lien in the amount of \$13.60, together with plaintiff's costs and disbursements in this action incurred, including a reasonable attorney's fee to be set by the Court.

4. For such other and further relief as to the Court may seem meet and equitable in the premises.

DAVIS & RENFREW,
Attorneys for the Defendants, Ray Wolfe, Esther Wolfe, Robert Wolfe, Margaret Wolfe, and Ed Wilholth, Doing Business as Wolfe Hardware and Furniture Company.

By /s/ EDWARD V. DAVIS.

Duly verified.

Service acknowledged.

EXHIBIT "W"

RAY WOLFE, ESTHER WOLFE, ROBERT WOLFE, MARGARET WOLFE, and ED WILHOLTH, Co-partners, Doing Business Under the Firm Name and Style of WOLFE HARDWARE & FURNITURE,

Claimants,

vs.

RALPH RUSSELL THOMAS, RUSSELL W. SMITH, and AUDREY CUTTING,

Defendants.

CLAIM OF LIEN

Know All Men by These Presents: That claimants above named, doing business at Anchorage, Alaska, under the firm name and style of Wolfe Hardware and Furniture, have, at the special instance and request of Russell W. Smith, furnished materials in the construction of a certain building located on the hereinafter-described real estate within the Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, to wit:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the Townsite of Anchorage, Alaska, according to the map and plat of the Welch Subdivision, which map and plat is on file and of record in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Precinct, at Anchorage,

Alaska, together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

That the name of the owner, or reputed owner, of the real property hereinabove described is Ralph Russell Thomas; that Audrey Cutting claims some right, title, or interest therein; that the residence building now on said premises was constructed by the above-named Russell W. Smith under a contract with the said Audrey Cutting, with the full knowledge and consent of the said Ralph Russell Thomas and was under construction during all the times hereinafter mentioned. That as claimants are informed and believe and so allege the fact to be, there are, or may be other persons or parties claiming some right, title or interest to the hereinbefore described property but the true names of such persons or parties are unknown to claimants.

That the reasonable price for such materials so furnished by the claimants was and is the sum of One Hundred ninety-nine and 80/100 Dollars (\$199.80), in lawful money of the United States of America; that no part of such sum has been paid; and that there is now due, owing and unpaid from the above-named defendants to the claimants the sum of One hundred ninety-nine and 80/100 Dollars (\$199.80), after deducting all just credits and offsets, and buildings in that sum.

That the materials so furnished by claimants were furnished at the special instance and request of Russell W. Smith, and that such materials were

actually used and expended upon the building above described in the construction of such building.

That said materials were so expended upon the above-described property between the 3rd day of May, 1948, and the 10th day of June, 1948, and that claimants ceased to furnish materials for use upon said building and property on the 10th day of June, 1948, and the expenditure thereof was completed on such date, and within ninety days prior to the filing of this claim of lien.

RAY WOLFE,

ESTHER WOLFE,

ROBERT WOLFE, and

ED WILHOLTH,

Co-partners, Doing Business Under the Firm Name
and Style of Wolfe Hardware & Furniture.

By /s/ RAY WOLFE,
Partner.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 12, 1949.

No. A-5087 and No. A-5088.

MINUTE ORDER DENYING MOTION

Now at this time upon motion of George B. Grigsby, counsel for plaintiffs in cause No. A-5087, entitled Ray Bullerdick, A. L. Baxley, Edward C. Rankin, Lee Runkle, Arden Bell and William Bes-ser, plaintiffs, versus Ralph R. Thomas, Audrey Cutting and Russell W. Smith, defendants, and cause No. A-5088, entitled Ted Van Thiel, et al., plaintiffs, versus E. V. Fritts, et al., that above-entitled causes be set for trial at 10:00 o'clock a.m. of Monday, January 31, 1949, and with Harold H. Butcher, counsel for defendant Cutting objecting,

It Is Hereby Ordered that the above motion be, and it is hereby, denied without prejudice.

Entered January 25, 1949.

No. A-5087 and No. A-5088.

HEARING ON MOTION TO SET CAUSES FOR TRIAL

Now at this time the plaintiffs not being present but represented by their counsel, George B. Grigsby, the defendants not being present but represented by their counsel, Harold J. Butcher, the following proceedings were had to wit:

Argument to the Court was had by Harold J. Butcher, for and in behalf of the defendants.

Whereupon the Court having heard the argument of counsel and being fully and duly advised in the premises,

It Is Ordered that cause No. A-5087, entitled Ray Bullerdick, et al., plaintiffs, versus Ralph R. Thomas, defendants, and cause No. A-5088, entitled Ted Van Thiel, et al., plaintiffs, versus Ralph R. Thomas, et al., defendants, be, and it is hereby, set for trial at 10:00 o'clock a.m. of Tuesday, February 8, 1949.

Entered Jan. 28, 1949.

[Title of District Court and Cause.]

No. A-5088.

AMENDED ANSWER TO COMPLAINT IN INTERVENTION

Comes now the defendant, Audrey Cutting, and answering for herself and on behalf of her minor daughter, Sylvia A. Henderson, admits and denies as follows:

I.

Denies each and every allegation in said complaint in intervention which has not previously been admitted or denied in the defendant's previous answer to the original complaint.

Affirmative Defense

That the defendant, Audrey Cutting, for herself and for and on behalf of Sylvia A. Henderson, a

minor, entered into a contract with a licensed contractor, one Russell W. Smith, under the terms of which the said Russell W. Smith agreed to construct the residence for the sum of Ninety-Five Hundred Dollars (\$9500.00) and that said contract personally made, on his own behalf as an independent contractor, all of the contracts for labor and/or materials set forth in the complaint and that the defendant, Audrey Cutting, for herself and for and on behalf of Sylvia A. Henderson, a minor, duly posted lien non-liability notices on the premises.

Wherefore, defendant prays that plaintiffs take nothing by their complaint in intervention and that they be hence dismissed with costs.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed February 8, 1949.

[Title of District Court and Causes.]

Case No. A-5087.

Case No. A-5088.

Case No. A-5087 and A-5088.

REPLY TO SECOND AMENDED ANSWER
OF DEFENDANTS, AUDREY CUTTING
AND SYLVIA A. HENDERSON

Come now Ken Hinchey and Nadien Hinchey,

doing business as Ken Hinchey Company, one of the above-named defendants, in reply to defendants' second Amended Answer, and admit, deny and allege as follows:

I.

Deny each and every allegation set forth in paragraph I of affirmative defense of defendants' second Amended Answer except the execution of a contract between Audrey Cutting and one Russell Smith, under the terms of which said Russell W. Smith agreed to construct the residence as set forth in the said contract.

II.

Admit that the defendant, Sylvia A. Henderson, is a minor child under the age of eighteen years as set forth in paragraph II of the affirmative defense of defendants' second amended answer and that since the recording of said deed in which Ralph R. Thomas is named as grantor and Sylvia A. Henderson is named as grantee which deed purports to have been executed on the 30th day of November, 1946, and which deed is now recorded in Book 71 of the City Records of Anchorage Recording Precinct at page 21, and Sylvia A. Henderson is now the record owner of Lot 2 in Block 37-D of the South Addition to the City of Anchorage, Alaska, and deny all and every other allegation contained in said paragraph II.

Wherefore, defendants, Ken Hinchey and Nadine Hinchey, doing business as Ken Hinchey Com-

pany, pray that they be granted the relief as asked in their Answer and Cross-Complaint herein previously filed and such other and further relief as to the Court may seem meet and equitable in the premises.

DAVIS & RENFREW,
Attorneys for Ken Hinchey
Company.

By /s/ PAUL F. ROBISON.

Duly verified.

[Endorsed]: Filed February 17, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

No. A-5087, A-5088.

No. A-5088.

No. A-5087.

No. A-5088.

No. A.-5087.

No. A-5088.

Execution

The President of the United States of America,
To the United States Marshal for the Third Division,
Territory of Alaska, Greeting:

Whereas, on the 8th day of April, 1949, the above-

named plaintiffs and intervenors recovered a Judgment and Decree in the above-entitled action and in the above-entitled Court, against the above-named defendants, which said Judgment and Decree was on the 8th day of April, 1949, recorded in the office of the Clerk of said Court in the General Journal, G-18, on page 325, and docketed in said Clerk's office, and in and by which Judgment and Decree it is Ordered, Adjudged and Decreed that the lands and premises described therein be sold at public auction as in said judgment and decree particularly set out.

Now, Therefore, you, the said Marshal, are hereby commanded and required to proceed to advertise for sale and to sell, in the manner provided by law, the premises described in said Judgment and Decree, a copy of which is hereto annexed and made a part hereof, and apply the proceeds of said sale as in said Judgment and Decree directed, and to make and file your report of said sale with the Clerk of this Court, and to do all things according to the terms and requirements of said Judgment and Decree and the provisions of the statute in such case made and provided, and make return of this Writ within sixty (60) days from the date hereof.

Witness the Honorable Anthony J. Dimond, Judge of said Court and the Seal of said Court hereto affixed this 16th day of April, 1949.

M. E. S. BRUNELLE,
Clerk.

By KATHRYN HOFF,
Deputy.

No. A-5087 and No. A-5088.

HEARING ON MOTION FOR STAY OF EXECUTION

Now at this time hearing on motion for stay of execution in cause No. A-5087, entitled Ray Bullerdick, et al, Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al, Defendants, and cause No. A-5088, entitled Ted Van Thiel, et al, Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al, Defendants, came on regularly before the Court, the plaintiffs and intervenors not being present but represented by George B. Grigsby, Edward V. Davis and J. L. McCarrey, Jr., the defendants not being present but represented by their counsel Harold J. Butcher, the following proceedings were had, to wit:

Argument to the Court was had by George B. Grigsby, for and in behalf of the plaintiff.

Argument to the Court was had by Edward V. Davis, for and in behalf of the Intervenor.

Argument to the Court was had by George B. Grigsby, for and in behalf of the plaintiff.

Argument to the Court was had by Harold J. Butcher, for and in behalf of the defendant.

Argument to the Court was had by Edward V. Davis, for and in behalf of the Intervenor.

Argument to the Court was had by George B. Grigsby, for and in behalf of the plaintiffs.

Whereupon the Court having heard the argument of respective counsel and being fully and duly ad-

vised in the premises, denies bond, and directs, following stipulation by and between respective counsel, the sale of subject property adjourned until 2:00 o'clock p.m. of Thursday, May 26, 1949.

Entered May 19, 1949.

No. A-5087 and No. A-5088.

HEARING ON JUSTIFICATION OF BONDSMEN

Now at this time hearing on justification of bondsmen in cause No. A-5087, entitled Ray Bullerdick, et al, Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al, defendants, and in cause No. A-5088, entitled Ted Van Thiel, et al, Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al, defendants, came on regularly before the Court, the plaintiff not being present but represented by their counsel, George R. Grigsby, the Intervenor not being present but represented by Edward V. Davis and J. L. McCarrey, Jr., of their counsel. The defendant, Audrey Cutting, being present and with her counsel, Harold J. Butcher. The following proceedings were had, to wit:

Argument to the Court was had by Harold J. Butcher, for and in behalf of the defendant.

Argument to the Court was had by Edward V. Davis, for and in behalf of the Intervenor.

Argument to the Court was had by Harold J. Butcher, for and in behalf of the defendant.

Marion P. Smith, being first duly sworn, testified for and in behalf of the Court.

Don H. Goodman, being first duly sworn, testified for and in behalf of the Court.

Whereupon the Court having heard the testimony and the arguments of respective counsel and being fully and advised in the premises, refused approval of bond both as to form and as to sureties.

Entered May 20, 1949.

MARSHAL'S RETURN OF EXECUTION

United States Marshal's Office
Territory of Alaska, Third Division.

I, Paul C. Herring, United States Marshal for the Third Division, for the Territory of Alaska, do hereby certify:

That I received the within and annexed writ of execution on the 18th day of April, 1949, and by virtue and in pursuance thereof I advertised the property described in the judgment herein and as follows, to-wit:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file and of record in the office of the United States Commissioner and ex-officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with the residence building thereon situated,

to be sold at public auction at the Southwest entrance to the Federal Building at Anchorage, Alaska, on 19th day of May, 1949, at the hour of Two o'clock p.m., that on said date, day and hour, pursuant to stipulation of all the parties to said action said sale was adjourned until the 26th day of May, 1949, at the hour of Two o'clock p.m. of said day.

That previous to said sale I cause due and legal notice thereof to be posted for the period of four weeks in three public places in the City of Anchorage, Alaska, and all within five miles of the place of said sale as stated aforesaid, to-wit, at the Post Office in the Federal Building, in the Office of United States Commissioner in the Federal Building, in the Federal Building and in the Federal Jail, and caused said notice to be published once a week for five successive weeks, to-wit, on the 19th and 26th of April, 1949, and on the 3rd, 10th and 17th of May, 1949, in the Anchorage Daily News, a daily newspaper published at Anchorage, Alaska, and nearest to the place of sale. That a true copy of said notice of sale so posted and published is together with the proof of publication thereof in the said Anchorage Daily News, hereunto attached and made a part of this return.

That on the 26th day of May, 1949, the day fixed for the sale of said premises as aforesaid and on which day said premises were sold, I attended at the time and place fixed for said sale and exposed the said premises for sale at public auction accord-

ing to law to the highest bidder for cash, and there being no other bidders, the said premises were thereupon struck off by me and sold to George B. Grigsby as Trustee for the judgment creditors for the sum of Fifteen Thousand Dollars (\$15,000.00) to be paid by said amount less my fees, commissions and expenses of sale being credited on said judgment.

I further certify that my fees, commissions and expenses of sale, amounting to the sum of Three Hundred and Seventy-Eight Dollars and Fifty Cents (\$378.50) were paid to me in cash by the said George B. Grigsby as said Trustee, leaving a balance of Fourteen Thousand Six Hundred and Twenty-one Dollars and Fifty Cents (\$14,621.50) to be credited upon said judgment, and that I have delivered to the said purchaser a Certificate of Sale of said premises, and that said premises so sold as aforesaid are subject to redemption as provided by law.

Dated this 9th day of June, 1949.

/s/ PAUL C. HERRING,
U. S. Marshal.

By OSCAR OLSON,
Deputy.

[Endorsed]: Filed June 9, 1949.

No. A-5087 and A-5088.

MINUTE ORDER EXTENDING TIME TO
DOCKET CAUSE WITH COURT OF AP-
PEALS

Now at this time, upon the motion of Harold J. Butcher, counsel for Defendant Audrey Cutting, with George B. Grigsby, counsel for plaintiff, objecting thereto,

It Is Ordered that Defendant Cutting be, and she is hereby given 30 days from this date to docket cause No. A-5087, entitled Ray Bullerdick, et al, plaintiffs versus Ralph R. Thomas, et al., defendants, and cause No. 5088, entitled Ted Van Thiel, et al., Plaintiffs, versus Ralph R. Thomas, Audrey Cutting, et al., defendants, with the Court of Appeals, Ninth Circuit.

Entered June 14, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

No. A-5088.

No. A-5087.

No. A-5088.

No. A-5087.

Nos. A-5087 and A-5088.

MOTION FOR CONFIRMATION

Comes now the above named plaintiffs and intervenors, and the above-named defendants, with the exception of defendants, Audrey Cutting, Ralph R. Thomas and Sylvia A. Henderson, by and through their attorneys, and by and through George B. Grigsby, acting as Trustee for the creditors, and pray that the sale under Judgment and Decree of Foreclosure entered in the above entitled matters may be confirmed in the manner provided by law, and that Marshal's Deed be issued to the purchaser forthwith.

The property which is the subject of the above entitled actions and which was sold under such Judgment and Decree is situated in the City of Anchorage, Third Division, Territory of Alaska and is more particularly described as:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file and of record in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Precinct at Anchorage, Alaska:

Together with the residence building thereon situated.

This motion is based upon the Marshals' return on execution dated on the 9th day of June, 1949 and filed in this action and upon the records and files in this action.

Dated at Anchorage, Alaska, this 12th day of July, 1949.

/s/ GEORGE B. GRIGSBY,

As Trustee for the Creditors and Acting for All Attorneys for Plaintiffs, Intervenors and Defendants, with the Exception of Defendants, Audrey Cutting, Sylvia A. Henderson and Ralph B. Thomas.

Receipt of copy acknowledged.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

No. A-5087 and No. A-5088.

No. A-5088.

No. A-5087.

No. A-5088.

No. A-5087.

No. A-5087, A-5088.

ORDER CONFIRMING SALE OF REAL PROPERTY UNDER JUDGMENT AND DECREE OF FORECLOSURE

This matter came on regularly for hearing upon motion of George B. Grigsby, as Trustee for the various creditors. The plaintiffs, the intervenors and all of the defendants, except Audrey Cutting, Sylvia A. Henderson and Ralph R. Thomas, having concurred in such motion, and such motion having requested confirmation of sale of certain real property hereinafter more particularly described under Judgment and Decree of Foreclosure issued in this matter in favor of all parties, except Audrey Cutting, Sylvia A. Henderson and Ralph R. Thomas, and against the real property hereinafter described, and that marshal's deed be forthwith issued conveying the property to George B. Grigsby, as Trustee.

The plaintiffs and intervenors and the defendants, with the exception of Audrey Cutting, Sylvia A. Henderson and Ralph R. Thomas, were present through their attorneys, and through George B. Grigsby, as Trustee, and the defendant, Audrey Cutting, was personally present with Harold J. Butcher, her attorney, and the defendant, Sylvia A. Henderson, was present through Harold J. Butcher, her attorney;

The Court proceeded to examine the return of the Deputy United States Marshal concerning the sale of hte property hereinafter described, and to examine the other records and files in this action, and to hear the proofs offered in support of the motion; and

It appearing to the Court that under and by virtue of Judgment and Decree of Foreclosure entered and issued out of this Court in the above entitled matter. and execution issued thereon the Deputy United States Marshal at Anchorage, Third Judicial Division, Territory of Alaska, did notice for sale the property hereinafter described for the 19th day of May, 1949, at the hour of 2 o'clock p.m., and that at such time, pursuant to Stipulation of all the parties to the action, the sale was adjourned until the 26th day of May, 1949, at the hour of 2 o'clock p.m.; and

It further appearing that on the 26th day of May, 1949, at the hour of 2 o'clock p.m. the United States Marshal for the Third Division, Territory of Alaska, did attend at the place where the sale

was to be held, to-wit: At the Southwest entrance of the Federal Building at Anchorage, Alaska, and at that time did sell such property, and that upon such sale George B. Grigsby, as Trustee for the judgment creditors, became the purchaser of said property for the sum of Fifteen Thousand Dollars (\$15,000.00), which included the Marshal's fees and costs amounting to Three Hundred Seventy-eight and 50/100 Dollars (\$378.50); and

It appearing to the Court that notice of the sale was given in the manner provided by law and that said sale was fairly and legally conducted and that the real estate hereinafter described consisted of one known lot or parcel of land, and that the sum of Fifteen Thousand Dollars (\$15,000.00) was the highest and best bid made for such property; and

It further appearing that the purchaser has received a Certificate of Sale to the property as Trustee for the judgment creditors, and that as such Trustee, is entitled to have such sale confirmed by this Court.

Now, Therefore, the Court being fully advised in the premises

It Is Hereby Ordered, Adjudged and Decreed that the sale under execution of the property hereinafter described to George B. Grigsby, Trustee for the Judgment Creditors, shall be, and the same is hereby confirmed.

It Is Further Ordered that the Marshal shall proceed to issue a Marshal's Deed conveying the property hereinafter described to such Trustee at

the expiration of one year from the date of this Order, if no redemption has been had.

The property sold as aforesaid, and which is the subject of this action, is located in the City of Anchorage, Third Division, Territory of Alaska, and is more particularly described as follows:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file and of record in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Precinct at Anchorage, Alaska.

Done in open Court at Anchorage, Alaska, this 20 day of July, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered July 20, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1949.

[Title of District Court and Causes.]

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

No. A-5088.

No. A-5087.

No. A-5088.

No. A-5087.

Nos. A-5087 and A-5088.

NOTICE OF SALE

Under and by virtue of an Execution issued out of the above-entitled Court on the 16th day of April, 1949 on a Judgment and Decree heretofore and on the 8th day of April, 1949 rendered in said Court in favor of the above-named plaintiffs and intervenors, and against the above-named defendants, which said Judgment and Decree was, on the said 8th day of April, 1949, recorded in the Office of the Clerk of said Court in the General Journal, G-18 at Page 325, and docketed in said Clerk's office, I am commanded to sell all that certain premises described as follows, to-wit:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file and of record in the Office of the

United States Commissioner and ex-Officio Recorder for Anchorage Precinct at Anchorage, Alaska, together with the residence building situated thereon.

Notice is hereby given, that on the 19th day of May, 1949 at 2:00 o'clock p.m. of that date at the Southwest front entrance of the Federal Building in Anchorage, Alaska, I will, in obedience to said Writ of Execution, sell the above described premises to satisfy said Judgment and Decree, with interest and costs and costs and expenses of sale, to the highest and best bidder for cash, in current lawful money of the United States.

Dated this 18th day of April, 1949.

JAMES H. PATTERSON,
United States Marshal.

By /s/ OSCAR OLSON,
Deputy.

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

United States of America,
Territory of Alaska, Third Division—ss:

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 114 pages, numbered from 1 to 114, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the designation of record filed in my office on the 2nd day of July, 1949; that the foregoing transcript has been prepared, examined and certified to by me, and the costs thereof, amounting to \$37.80, has been paid to me by Harold J. Butcher, counsel for Defendants Cuttings and Henderson herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 3rd day of August, 1949.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellant,

vs.

RAY BULLERDICK, et al,

Appellees.

Transcript of Record
In Three Volumes
Volume III
(Pages 239 to 577)

Appeal from the District Court for the
Territory of Alaska,
Third Division

FILED

AUG 4 1950

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellant,

vs.

RAY BULLERDICK, et al,

Appellees.

Transcript of Record
In Three Volumes
Volume III
(Pages 239 to 577)

Appeal from the District Court for the
Territory of Alaska,
Third Division

In the United States District Court for the
Territory of Alaska, Third Division

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

Before: The Honorable Anthony J. Dimond,
United States District Judge.

Tuesday, February 8, 1949.

Appearances:

GEORGE B. GRIGSBY,

Attorney at Law, Anchorage, Alaska, appearing for Ray Bullerdick, et al., plaintiffs in cause No. A-5087, Ted Van Thiel, et al., copartners as Brady's Floor Covering. E. V. Fritts, et al., copartners as Alaska Paint and Glass Company; and City Electric of Anchorage, Inc., a corporation, plaintiffs in cause No. A-5088 and the intervenors, Ted Van Thiel, et al., copartners as Kennedy Hardware.

J. L. McCARREY, Jr.,

Attorney at Law, Anchorage, Alaska, appearing for intervenors, Arthur F. Waldron, et al., copartners as Anchorage Sand and Gravel Company.

WENDELL P. KAY,

Attorney at Law, Anchorage, Alaska, appearing for intervenors Ketchikan Spruce Mills, Inc., a corporation, and Alaskan Plumbing and Heating Company, Inc., a corporation.

HERALD E. STRINGER,

Attorney at Law, Anchorage, Alaska, appearing in the capacity of intervenor as Trustee for the Estate of Russell W. Smith, Bankrupt.

EDWARD V. DAVIS and

PAUL F. ROBISON,

Attorneys at Law, Anchorage, Alaska, appearing for intervenors, Ken Hinchey and Nadine Hinchey, copartners as Ken Hinchey Company; intervenors Ray Wolfe, Esther Wolfe, et al., copartners as Wolfe Hardware and Furniture.

HAROLD J. BUTCHER,

Attorney at Law, Anchorage, Alaska, appearing for the defendants, Audrey Cutting, and Sylvia A. Henderson, a minor.

(No appearance was made by the defendant Ralph R. Thomas in person or by attorney.)

(Whereupon, at 2 o'clock, p.m., Tuesday, February 8, 1949, the above-entitled matter came on for hearing.)

PROCEEDINGS

The Court: This is the time set for trial of the consolidated cases A-5087 and A-5088. Pursuant to stipulation of counsel made previously in Court, Mrs. Catherine Parsons has been appointed Special Court Reporter for this case.

I have read all the pleadings and those which were filed today, this includes an amended answer to the complaint in intervention made by defendant Audrey Cutting and also answering for her minor daughter Sylvia Henderson. I have read the answer of Ken Hinchey and Nadine Hinchey doing business as Ken Hinchey Company.

Mr. Davis: Your Honor, if you have read the previous answers it is identical with the others except as to the amounts.

The Court: Mr. Hinchey is not present in Court?

Mr. Davis: He will be here in a minute or two.

Mr. Grigsby: If it please, Your Honor, let's proceed with this case. I would suggest, Your Honor, that the counsel who are present representing the various parties might be able to save some time if they were to stipulate as to facts, thus eliminating the necessity of calling a great number of witnesses.

Mr. Davis: If the Court please, before going further, I said I had filed Exhibit "W," as a mat-

ter of fact I did not file that and have it here. I have attached it to the copies [5*] for the other parties, however.

The Court: You may attach it.

Mr. Davis: This is the answer in cross-complaint of Wolfe Hardware and Furniture.

The Court: Which case was it filed in?

Mr. Davis: A-5087, I believe.

The Court: In looking over the pleadings I notice that no where is Sylvia A. Henderson named as a party.

Mr. Davis: It is my recollection that in a pleading filed by Mr. McCarrey that Sylvia A. Henderson's name was indicated as the defendant and her name appears in the title of the case about five lines up from the bottom of the page.

The Court: Court will stand in recess for 10 minutes.

(Short recess.)

The Court: Mr. Davis.

Mr. Davis: If it please the Court, we have agreed on certain facts to which we can stipulate. It is stipulated between the plaintiffs represented by George Grigsby and the plaintiffs in intervention represented by McCarrey and the plaintiffs in the second suit—Brady's Floor Covering, Alaska Paint and Glass Company, and City Electric of Anchorage, represented by Mr. Grigsby, and the defendants in intervention Wolfe Hardware and Furniture, Ken Hinchey Company, represented by

* Page numbering appearing at top of page of original Reporter's Transcript.

Edward V. Davis, and the defendant Russell Smith, through his attorneys as Trustee in Bankruptcy, Mr. Stringer and Mr. [6] Dimond, and the defendant Audrey Cutting. I believe that is all of the parties represented here.

Mr. Kay: No, it isn't.

Mr. Davis: I have left out a couple—Alaska Plumbing and Heating and Ketchikan Spruce Mills, represented by Mr. Kay, also plaintiffs in intervention.

The Court: Do they embrace all of the parties?

Mr. Davis: I believe it does, Your Honor. It is stipulated at this point by all the parties that the property in question in these two suits is lot 2, block 37-D, South Addition, to the original town-site according to the Welch Subdivision and according to the map and plat of such subdivision on file and of record in the office of the United States Commissioner and ex-officio recorder for Anchorage precinct at Anchorage, Alaska, and that until August 1st, 1948 the record owner of that property was Ralph Russell Thomas and that Ralph Russell Thomas is the same person as the Ralph R. Thomas, and on August 1st, 1948 a deed was recorded from Ralph R. Thomas to Sylvia A. Henderson and that deed having been executed on the 30th day of November, 1946 and conveying to Sylvia A. Henderson the property here in question and that since the 4th day of August, 1948, Sylvia A. Henderson has been the record owner of the property in question.

It is stipulated by the parties that a contract was

made by Audrey Cutting or possibly by Audrey Henderson Cutting with one, Russell Smith, by the terms of which Mr. Smith agreed [7] to construct a building on the real property previously described.

The Court: Was this contract in writing?

Mr. Davis: The contract was in writing, Your Honor. It is stipulated by all the parties, Your Honor, that the various lien claimants have all recorded lien claims against this property with the United States Commissioner at Anchorage, Alaska, and that this property lies within the Anchorage Recording Precinct.

It is stipulated by all the lien claimants, as distinguished from the defendants, that lien claims of the various parties as filed are true. Mr. Butcher has not joined in that particular part of the stipulation with the other parties but Mr. Butcher on behalf of the defendants Audrey Cutting and Sylvia Henderson has stipulated that the lien claims of each of the lien claimants have been filed *with* the time limited by law subject to the exception that if any lien claims should appear during the course of the proceedings not filed within the time then that lien claim will be withdrawn.

Mr. Butcher: Mr. Davis, would you repeat that part about the lien claims? I believe I missed this.

Mr. Davis: Stipulation that defendants will stipulate that each and all of the lien claims filed by the various claimants were filed in accordance with the law and within the time allowed by law unless during the course of the trial it should [8] be dis-

covered that they were not filed in time, in which event the claimant who didn't file in time withdraws his lien from the proceedings.

Mr. Grigsby: I think Mr. McCarrey desires to call his witness at this time.

Mr. McCarrey: I represent the Anchorage Sand and Gravel Company and the Cinder Concrete Products Company, and at this time I would like to call Mr. Waldron.

The Court: As to the characteristics of the parties, has it been discussed with their partnership or whatever they claim to be?

Mr. Davis: That hasn't been discussed, Your Honor.

Mr. Butcher: I will stipulate that each of the parties are either as described and individually a partnership or corporation.

Mr. Kay: It is further stipulated that the corporations have filed their reports last due.

Mr. Butcher: I will not stipulate to that point. My objection is that it hadn't occurred to me that there were any corporations involved. However, I will stipulate to them. I will so stipulate to those of the City Electric, Alaska Plumbing and Heating, this including all corporations.

Mr. Kay: It is stipulated then that the corporations which are parties to this action and each and all of them have paid their license fees and whatever other requirements are [9] needed in the case of corporations.

Mr. McCarrey: Is it necessary to prove the partnerships?

Mr. Butcher: No.

ARTHUR F. WALDRON

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Your name is Arthur F. Waldron?

A. It is.

Q. You reside in the City of Anchorage?

A. Yes.

Q. At all times your name of Arthur F. Waldron is the person whose name appears in the liens and complaint in intervention? A. Yes.

Q. Also, I ask that you identify this?

A. I identify this as a copy of the lien filed for Cinder Products.

Q. Your signature appears on the lien and were you authorized to act in the capacity of partners?

A. I was.

Mr. McCarrey: That is the original, Your Honor. That is the original filed by the Cinder Products and filed in the United States Commissioner's office.

Q. Can you state the page? [10]

A. Page 57 in the United States Commissioner's office and appears at book No. 70.

Q. For what purpose was that lien filed, Mr. Waldron?

A. That was for materials delivered to the—

(Testimony of Arthur F. Waldron.)

furnished to the residence. I don't recall the exact address on that.

Q. Do you have any recollection of it?

A. Yes, I believe it was 410 "H" Street.

Q. What were those materials that you did furnish?

A. Those materials were building blocks and cinder.

Q. And on what dates?

A. The 10th day of May and 18th.

Q. Do you recall who ordered these materials?

A. Russell Smith was the one who ordered them.

Q. Did you give credit to Russell Smith?

A. I did not. We notified Audrey Cutting that we would not deliver until guarantee of payment was received and which we were given verbally.

Q. I ask can you identify this instrument?

A. This is an assignment of material lien from the Cinder Concrete Products Company to Anchorage Sand and Gravel Company.

Mr. McCarrey: I would like to offer this in evidence.

The Court: Is there objection?

Mr. Butcher: No objection.

The Court: It may be admitted in evidence and marked Intervenor's Exhibit "A." [11]

Mr. McCarrey: We would like, Your Honor, for the assignment to appear as Exhibit "A" and the lien as Exhibit "B."

The Court: The lien will be marked Exhibit

(Testimony of Arthur F. Waldron.)

“B” and the Assignment will be marked Exhibit “A” as requested by counsel.

Q. (By Mr. McCarrey): Can you identify this, Mr. Waldron?

A. I can. It is a lien placed by the Anchorage Sand and Gravel.

Q. Under whose signature?

A. Arthur F. Waldron.

Q. For what purpose?

A. That was for materials delivered to 410 “H” Street by the Anchorage Sand and Gravel Company.

Q. At whose request were those materials delivered?

A. They are delivered to Russell Smith under authority of Audrey Cutting.

Q. Did you give credit to Mr. Smith?

A. I did not. The credit was given to Audrey Cutting.

Q. What is the sum set forth in the lien as being unpaid? A. \$377.61.

Q. What did you furnish?

A. We furnished concrete, cinder and some concrete sealer.

Q. Were you ever paid for the materials furnished by the Cinder Products Company?

A. No, we have never been paid for that even.

Mr. McCarrey: Your Honor, we offer this lien as Intervenor’s Exhibit “C.”

Mr. Butcher: No objection.

(Testimony of Arthur F. Waldron.)

Mr. McCarrey: That is all I have, Your Honor.

Mr. Butcher: May I have the exhibits, Your Honor?

Cross-Examination

By Mr. Butcher:

Q. Mr. Waldron, I would like to question you briefly relative to the furnishing of the material in the case of the Cinder Products Company which was ordered by Mr. Russell Smith. This order was placed by Mr. Smith?

A. I believe that is correct, yes. It was ordered and Mr. Jack Harrison took the order on that.

Q. And when did it first come to your attention that such an order was placed?

A. Came to my attention when Russell—when I contacted Mr. Smith to furnish me an authorization from Mrs. Cutting before I delivered the materials.

Q. Who called Audrey Cutting?

A. I personally went to the office twice and talked to her personally before delivering the material.

Q. Did you not say that you called Audrey Cutting on the Cinder Concrete Products and talked to her about it?

A. I did not, but Mr. Jack Harrison had talked to her before he made delivery, as I instructed him to do. [13]

Q. What Mr. Harrison said to you is hearsay and is not admissible.

Q. You did not talk to Audrey at any time and say you would not give credit?

(Testimony of Arthur F. Waldron.)

A. I did not.

Q. Did you handle the billing for the sale?

A. At the time the original billing was mailed I did not.

Q. Do you have copies? A. I have copies.

Q. Do you know who the bills went to?

A. I am not positive of that.

Q. You didn't know whether the bills were made to Audrey Cutting or Russell Smith?

A. I did not.

Q. You really don't know, do you?

A. I do not.

Q. Do you happen to know who received delivery of the materials from the Cinder Product Company? A. I do not.

Q. You don't know whether it was Cutting or Smith? A. I do not.

Mr. Butcher: Your Honor, in connection with the Cinder Block Product Company, I am anxious to determine the full history of it and if a second contract was made I would like to know by showing of the papers on this case. [14]

The Court: Can you furnish such documents?

Mr. McCarrey: I think I can, Your Honor. I was going to suggest that we get Mr. Harrison to come to testify personally. I can get him in 15 or 20 minutes.

Q. (By Mr. Butcher): Was this a matter that Mr. Smith dealt with you?

A. This is a matter which Mr. Smith dealt with

(Testimony of Arthur F. Waldron.)

us personally. He came to the office and told me he was planning to build the building for Audrey Cutting.

Q. Did he say he had a contract?

A. I don't believe he did.

Q. He informed you that he intended to build it of cinder block or did that enter into later discussion?

A. It did not.

Q. Did you at any time endeavor to determine who was the true owner of the property?

A. I did not.

Q. Did you take Mr. Smith's word for it that he had a contract?

A. No, I took Audrey Cutting's word for it.

Q. At a later time you talked to Audrey Cutting?

A. Yes, at a later time.

Q. Did you question her about his credit?

A. No, I didn't.

Q. Did you ask her if his credit was any good?

A. No, I told her I would not give him any credit.

Q. Did you ask Cutting if she had a contract with Smith?

A. I did not. I just looked to her for payment of all the materials that he ordered.

Q. What did she say?

A. She said that it was all right and to go ahead and make the deliveries and she would take care of the payments.

Q. You don't recall that Mr. Smith had a signed

(Testimony of Arthur F. Waldron.)

contract and that she would be obligated to pay him when the building was completed?

A. I don't remember that.

Q. Do you know who receipted for delivery in connection with the materials furnished for the Audrey Cutting job?

A. Russell W. Smith in all cases, I believe.

Q. Then as far as the delivery was concerned you dealt with Mr. Smith? A. We did.

Q. You didn't believe it possible then that Mr. Smith had a contract to build?

A. I knew he was in charge of the construction and that is as far as I knew of it.

Mr. Butcher: That is all, Your Honor.

Re-direct Examination

By Mr. Grigsby:

Q. Did Audrey Cutting hold herself out to you as the owner [16] of the premises?

A. That was the impression I got from the conversations.

Q. You understood, then, that she was the owner? A. I did.

Q. Did Mr. Smith ever tell you?

A. Well, he told me he was building the house for Audrey Cutting.

Mr. McCarrey: I would like to reserve the right to call Mr. Harrison in support of Mr. Waldron's testimony.

(Witness excused.)

AUDREY HENDERSON CUTTING

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please?

A. Audrey Henderson Cutting.

Q. And you are one of the defendants in this
action? A. I believe so.

Q. Mrs. Cutting, did you make a contract with
Russell W. Smith to build a house on lot 2, block
37-D of the South Addition of the City of Anchor-
age? A. That is correct.

Q. Have you your copy of the contract?

A. Yes. [17]

Q. Is it here and may I see it?

Mr. Butcher: Her copy is in my office.

Q. (By Mr. Grigsby): Is this the contract you
entered into with Russell Smith for that building?

A. I believe so.

Q. Is that your signature?

A. That is my signature.

Q. I just want to call your attention to this
agreement made the 30th day of——

Mr. Butcher: I believe in connection with the
document that I have a right to see the document
first, please.

The Court: Counsel may proceed.

Mr. Grigsby: I want to offer in evidence con-

(Testimony of Audrey Henderson Cutting.)

tract which she signed. And, then, reading from the contract "This agreement made the 30th day of April, 1948 by and between Russell W. Smith, an independent contractor, doing business at Anchorage, Alaska, hereinafter called the contractor, and Audrey Cutting, hereinafter called the owner. Whereas, the owner is the owner of lot 2, block 37-D, South Addition to the original townsite of Anchorage * * *" I want to ask you, Mrs. Cutting, this contract purporting to be signed on the 30th day of April, were you at that time the owner?

A. It would depend on how you would look at it. I bought the lot for my minor daughter; as the guardian I would be the owner. [18]

Q. But in dealing with the various people, including this contractor Smith and the people who furnished materials for that building, did you represent yourself as owner?

A. I was representing both myself and my daughter.

Q. Prior to the construction of that building, did you apply for a building permit from the City?

A. I believe Mr. Smith applied for the building permit.

Q. You have seen it? A. Yes.

Q. You were designated as owner?

A. That is correct.

Q. You were at that time the reputed owner as far as the job was concerned? A. Yes.

Q. But you daughter was the real owner?

(Testimony of Audrey Henderson Cutting.)

A. That is correct and I was her guardian.

Q. And in your answer you state in paragraph 1 you admit that you are the owner of certain real property situated in Anchorage, Alaska and particularly described as follows: —and then the lot is described as lot 2 of block 37-D, South Addition, of the original townsite of Anchorage?

A. That is true.

Q. And for all purposes you were what is considered as the owner of the property?

A. That is correct. [19]

Mr. Grigsby: That is all.

Q. (By Mr. Kay): Mrs. Cutting, in paying for this lot did you pay for it on a so-called real estate contract? A. Yes.

Q. That was a contract with Ralph Russell Thomas? A. That is correct.

Q. Do you have a copy of that contract?

A. I believe there is a copy in the Union Bank.

Q. Was the deed placed in escrow in connection with that contract? A. That is correct.

Q. Could you state whether that is a contract between you and Mr. Thomas or how was it?

A. The contract was between my daughter and Mr. Thomas.

Q. And was it signed by you? A. No.

Q. It is your testimony that a deed is placed in the Union Bank, do you have a copy?

A. No, I do not.

(Testimony of Audrey Henderson Cutting.)

Cross-Examination

By Mr. Butcher:

Q. Mrs. Cutting, do you recall whether you picked up the contract? [20]

A. I do believe I have it but I don't know just where it might be in my personal possessions.

Redirect Examination

By Mr. Kay:

Q. When the contract was signed was there any question as to a minor signing the contract?

A. No.

Q. Who drew the contract?

A. Mr. McCutcheon and Mr. Nesbett.

Q. And your daughter came in and signed it in their presence? A. That is correct.

Q. And your signature does not appear on it any place?

A. No, it doesn't; as I remember it doesn't.

Q. Can you produce a copy of the contract?

A. At my first opportunity I will try to find the contract and bring it here.

Mr. Dimond: Your Honor, at this time I would like to introduce this contract in evidence between Russell Smith and Audrey Cutting.

Mr. Butcher: No objection.

Mr. Dimond: I would like to have it marked as Defendant Russell Smith's Exhibit No. 1.

Q. (By Mr. Dimond): Mrs. Cutting, you have admitted you entered into a written contract between yourself and Russell Smith? [21]

(Testimony of Audrey Henderson Cutting.)

A. Yes, that is correct.

Q. Did he complete the work? A. Yes.

Q. Did you ever pay him for it? A. No.

Q. Have you ever promised to pay him for it since the completion of the house?

A. Yes. Mr. Smith was well aware of the fact that I intended to pay him but he presented his bill for services in the amount of \$13,500. The contract was for \$9,800.

Mr. Kay: Your Honor, in the answer filed and sworn to by Mrs. Cutting they have admitted owing the money. May I read the answer to the complaint in intervention, Your Honor?

The Court: If you wish to ask a question, you may.

Mr. Butcher: It is the answer to the complaint in intervention, Your Honor, which was filed by myself while Mrs. Cutting was in California and I believe I made a mistake.

Q. (By Mr. Kay): Did you ever promise to pay Mr. Smith the amount of \$10,500?

A. No, I did not.

Q. Did you accept the house from him after completion?

A. Well, there wasn't anything else that I could do.

Q. Did you accept it?

A. I haven't received all the house keys and there was certain work that Mr. Smith was to do.

Q. Isn't it true that you rented the house?

(Testimony of Audrey Henderson Cutting.)

A. That is correct.

Recross-Examination

By Mr. Butcher:

Q. Did you have any conversation with Mr. Smith as to the unfinished work?

A. That is correct. Just before he finished the house the basement leaked and, of course, the discussions on the contract and his statements that it was supposed to be waterproof, and then leaked. He was going to fix this. And then certain doors in the place didn't close.

Q. Did you call these defects in the construction to his attention? A. That is correct.

Q. What did he say?

A. It seemed that Mr. Smith had subcontracts with the Alaskan Plumbing and Heating Company.

Q. Did he say that he would take care of it?

A. Yes, if it were possible he would.

Q. Was it at that time that he presented you with the bills? A. Yes.

Q. What was the amount of that bill?

A. \$13,500.

Q. Did you tell him that you wouldn't pay him that much? A. That is correct. [23]

The Court: Did you actually pay Mr. Smith anything?

The Witness: Not anything. That was the terms of the contract.

(Testimony of Audrey Henderson Cutting.)

Q. (By Mr. Butcher): The house was to be completed to your satisfaction, was it not?

A. That is quite right.

Q. Did Mr. Smith ever agree to accept \$9800?

A. No, because he was obligated to pay out the sum of \$13,500 to various laborers and business people.

Q. Is there any explanation for this?

A. He explained that it cost him more than he had estimated.

Q. At any time during the construction did he tell you it cost more? A. No.

The Court: What is the size of your house?

The Witness: 21 by 31, four rooms, two bedrooms, front room, kitchen, bath room and basement.

The Court: The original contract price was \$9800?

The Witness: That is correct.

Further Redirect Examination

By Mr. Stringer:

Q. Did Mr. Smith have any discussion with you about a porch?

A. Yes, he explained to me that the FHA would not okeh a loan on the place unless there was a porch covering the basement [24] entrance and I asked Mr. Smith how much that would cost and he said around but not over \$200 and I said as long as the contract doesn't go over \$10,000 that will be all

(Testimony of Audrey Henderson Cutting.)
right but I don't want it any more than \$10,000.

Q. (By Mr. Dimond): Isn't it true, Mrs. Cutting, that this was a verbal contract about the porch not being more than \$200?

A. It was added expense and I didn't—

Q. Just answer my question—Wasn't it a verbal agreement? A. Yes.

Q. Was the porch actually put on?

A. Yes, it was.

The Court: Did you ever tender any money to Mr. Smith in payment for his services under this contract? A. No.

Q. Never gave him any money at all?

A. No.

Q. Did you ever offer to give him any money?

A. No.

Q. (By Mr. Grigsby): You have possession of those premises now? A. That is right.

Q. They are occupied by Al Fox?

A. That is correct.

Q. You are getting the rent? [25]

A. That is correct.

Mr. Grigsby: No further questions.

Mr. Butcher: I have a question in connection with the \$2500 she agreed to pay.

Further Recross-Examination

By Mr. Butcher:

Q. Did you talk with the FHA people or did you talk to Mr. Smith about this porch?

(Testimony of Audrey Henderson Cutting.)

A. Mr. Smith came to me.

Q. Did he at any time say he would include the porch in the original price?

A. He said it would cost such a small amount that it didn't make any difference.

Q. It still remained the \$9800 then?

A. He said it was such a small amount that it wasn't necessary, that it shouldn't exceed \$200.

Q. Did you ever agree to pay anything more?

A. No, I did not.

Q. He went ahead and completed the porch?

A. Yes.

Q. And——

The Court: When was the house first rented?

The Witness: I believe that I actually didn't take possession until about the 15th of July, 1948.

The Court: Has it been rented since that time?

The Witness: Mr. Fox moved recently but Mr. Louis now lives in it.

The Court: Would you mind telling us how much rent you are receiving?

The Witness: I am receiving \$150 a month rent.

The Court: Is this the same amount since first rented in July?

The Witness: Yes.

The Court: What is done with the rent received by you?

The Witness: It is used in support and maintenance and education of my daughter. It is put in her account.

(Testimony of Audrey Henderson Cutting.)

The Court: How do you get money out of her account?

The Witness: By being guardian.

The Court: Do you sign her name and then yours as guardian?

The Witness: We had a partnership account. She can sign checks as well as myself.

The Court: Just the same as you can?

The Witness: Yes.

The Court: What is her age at the present time?

The Witness: She is 17.

The Court: How long has this account been in existence?

The Witness: Since August 1st last year.

The Court: Has she actually drawn any checks on this account and how much has she drawn? [27]

The Witness: About, well, I would say \$100 a month.

Further Redirect Examination

By Mr. Kay:

Q. Where is that account?

A. Seattle First National Bank.

Q. Are rent checks deposited in that account?

A. Yes, because my daughter is outside going to school.

Q. This is really a joint account? A. Yes.

Q. Does this account consist entirely from the rents from the building?

A. No. I deposit other moneys to this account

(Testimony of Audrey Henderson Cutting.)

and this is an educational fund and just in case anything happened to me she would have money for her education and livelihood.

Q. When you receive this rent do you receive it by check? A. Yes.

Q. How do you get this money to the joint account?

A. I deposit it to my account which is a trust account and then forward it to the Seattle Bank. I have a trust account for all moneys which are taken into escrow.

Q. You deposit to that account?

Mr. Butcher: Objection.

The Court: Sustained.

Court will stand in recess.

(Short recess.) [28]

Mr. McCarrey: I should like to call Mr. Harrison to establish one point.

JACK F. HARRISON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. State your name?

A. Jack F. Harrison.

Q. Where do you reside?

A. Anchorage, Alaska.

(Testimony of Jack F. Harrison.)

Q. What is your business?

A. Manufacturing concrete products.

Q. And you are familiar with the merchandise and the conditions surrounding same that you delivered to the job known as the Cutting job?

A. Yes, sir.

Q. Do you recall whether any lien was ever filed?

A. Yes, sir.

Q. I hand you Exhibit "B," is that your signature at the bottom? A. Yes, sir.

Q. This lien was filed against lot 2 in block 37-D in the South Addition for merchandise that you delivered to the Audrey Cutting job? [29]

A. That is correct.

Q. I will ask if you recall whom you gave credit to on that particular job?

A. Mr. Smith came to me with the contract and wanted to know if we would supply materials and I said I could and then I called Mrs. Cutting on the 'phone to see what the deal was between she and Mr. Smith. She said Mr. Smith had been authorized to build the house and she said she would guarantee the accounts.

Q. How did the bills read?

A. Russell Smith, the Audrey Cutting Job.

Q. You gave credit to Audrey Cutting?

A. Yes.

Cross-Examination

By Mr. Butcher:

Q. Do you have those bills with you?

A. I think Mr. McCarrey has them.

(Testimony of Jack F. Harrison.)

Mr. McCarrey: If counsel wishes we will be glad to identify them.

Q. (By Mr. Butcher): I will ask you if you know what these items represent?

A. They represent the deliveries on the dates indicated on the bills.

Q. Will you look through those and see if all of those are your slips which you checked out to the Audrey Cutting job? [30]

A. They are.

Q. And they are all for merchandise?

A. That is correct.

Q. Mr. Harrison, the first you knew anything about the Audrey Cutting job was when Mr. Smith came to you? A. Yes.

Q. Did he state how much material he would need and where he wanted it to be delivered?

A. Yes.

Q. Did he tell you he had a contract?

A. Yes.

Q. Did he tell you he was not to be paid until the house was built? A. That is right.

Q. Did he tell you not to expect payment until he got his money? A. Yes.

Q. It was sometime later that you had a doubt whether Mr. Smith's credit was good?

A. That is right.

Q. Before you delivered the blocks?

A. Yes, that is right.

Q. Audrey Cutting told you that there was such a contract? A. That is right.

(Testimony of Jack F. Harrison.)

Q. Did you ask her about the terms and that nothing would [31] be paid until the house was completed?

A. No, I didn't ask about that.

Q. Did you know that \$9500 was the price for the job as set forth in the contract?

A. No, I didn't know the amount that was stipulated by the contract.

Q. Is this your normal method of billing?

A. Yes.

Q. You understood that the job was for Audrey Cutting that Russell Smith was the man with whom you were dealing?

A. That is right.

Q. Now, in your conversation with Mrs. Cutting did she say that she would pay if Smith didn't?

A. That was my understanding.

(Witness excused.)

ARTHUR F. WALDRON

called as a witness herein, being previously duly sworn, resumed the stand, and testified as follows:

Further Redirect Examination

By Mr. McCarrey:

Q. Mr. Waldron, you state that you had delivered merchandise and material to the Audrey Cutting job and that was represented by a lien which was filed in the sum of \$377.61, and I ask if you can identify them?

(Testimony of Arthur F. Waldron.)

A. Yes, those are the liens representing the materials delivered [32] to the Audrey Cutting job at 410 "H" Street.

Q. I ask if she signed for them?

A. No the deliveries were signed for by Russell W. Smith.

Q. Do they represent all merchandise delivered to the Audrey Cutting job? A. They do.

Recross-Examination

By Mr. Butcher:

Q. Mr. Waldron, are these in your handwriting?

A. They are not. They are made out by the man who makes the delivery.

Q. Do you recognize his handwriting—would you examine them and identify them. Do you find them to be correct? A. I did.

Q. Were those slips issued in your regular course of business?

A. That is our regular delivery form, person on the job signs it—signs the original and the other duplicate goes to our office.

Q. They are issued contemporaneously with the delivery of the merchandise?

A. That is right.

Mr. McCarrey: Enter it as Alaska Sand and Gravel Company exhibit "E." [33]

Q. (By Mr. Butcher): Mr. Waldron, did you examine these documents for the signature of the

(Testimony of Arthur F. Waldron.)

person who received the goods and would you recognize Mr. Smith's signature?

A. I can't say I would recognize Mr. Smith's signature. ..

Q. You are not insisting that Audrey Cutting received it?

A. No, that they were delivered on the property designated as her's and Mr. Smith made receipt of the materials.

The Court: That is all, Mr. Waldron.

(Witness excused.)

RUSSELL W. SMITH

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please?

A. Russell W. Smith.

Q. You are one of the defendants in this action, Mr. Smith? A. Yes.

Q. You have been in the court room, haven't you? A. No, this is the first day.

Q. All afternoon? A. Yes.

Q. You are the Russell W. Smith who made a contract with Audrey Cutting on lot 2, block 37-D of the City of Anchorage? A. Yes. [34]

(Testimony of Russell W. Smith.)

Q. Mr. Smith, I will hand you a paper and will you state, if you know, what that is?

A. This is bookkeeper's copy of the bills that were taken on Audrey Cutting Job.

Q. That is the itemized account of the expenses occurred in the construction of that building?

A. That is right.

Q. On the back of that is a list of labor and is that for the same construction?

A. That is right.

Q. Did the materials charged here and the labor charged here on the back of this paper go into the construction of that building?

A. As far as I know that is a correct account of it.

Q. You furnished that to Mr. Kay as being a correct account, did you not?

A. Yes.

Q. Who keeps your books? A. My wife.

Q. Your wife, is that right? A. Yes.

Q. Now, on that account there is an item—Brady's Floor Covering, \$472.20, is that correct?

A. As far as I know. I don't know anything about it except that she took care of the bills. [35]

Q. She did all of the bookkeeping?

A. Yes.

Q. That is the data for the purpose of your bankruptcy proceeding? A. I think so.

Q. You have a list of labor for William Besser, Lee Runkle, Ray Bullerdick—

(Testimony of Russell W. Smith.)

Mr. Butcher: Objection.

The Court: Overruled.

Q. (By Mr. Grigsby): —Floyd Baxley, Edward Charles Rankin and Arden Bell? Did those men work on the construction of that building?

A. They did.

Q. Is this correct?

A. As far as I know.

Q. Is this the total of the hours they worked and the amounts they had coming?

A. As far as I know.

Q. You haven't paid any of these bills, have you? A. No.

Q. There is a charge here—Floyd Baxley \$220—was that for materials furnished, do you remember? Was that for lumber? A. I think it was.

Q. You know, don't you? [36]

A. Yes, that was for lumber that went into the building.

Mr. Butcher: If it is a true exhibit, is it about to be introduced in evidence?

Mr. Grigsby: I suppose I have a right to prove my account in my own way—prove by his oral testimony that those particular amounts are true. However, in the interest of harmony I will offer this paper in evidence.

That is all.

Cross-Examination

By Mr. Butcher:

Q. In answer to Mr. Grigsby's question, you stated your wife is a bookkeeper? A. Yes.

(Testimony of Russell W. Smith.)

Q. State her name?

A. Orilla I. Rowe.

Q. Is this her writing on this record?

A. I think it is.

Q. It is in your wife's writing?

(No response.)

Q. Do you recognize this as a list from your record book? A. I think it is.

Q. Please explain just how you came to get this sheet and who prepared it and what is its purpose?

A. Well, the bookkeeper prepared it—the sheet.

Q. Who prepared it? [37]

A. Orilla I. Rowe.

Q. What did she prepare it from?

A. From the record she had that I had gotten from the various companies that had furnished materials.

Q. From bills? A. Yes.

Q. You accepted those bills as correct?

A. Yes.

Redirect Examination

By Mr. Grigsby:

Q. Now I have here an item, Kennedy Hardware for \$87.34, is that correct?

A. As far as I know that was correct.

Q. You never disputed it? A. No.

Q. City Electric, \$450.28, is that correct?

A. To my knowledge it is.

(Testimony of Russell W. Smith.)

Q. Charles Fritts, paint \$647.80, that was a bill rendered to you by the Alaska Paint and Glass Company? A. As far as I know it is.

Q. Brady's Floor Covering, \$373.20, is that correct. A. As far as I know, yes.

Q. Have you paid any of those bills?

A. No.

Q. I will ask, were you ever paid anything on this contract? [38] A. No.

Q. The different partnerships and persons represented on this sheet and on the back have requested payment from you, have they not?

A. Yes.

Q. You are unable to pay it because you have never been paid? A. Yes.

Q. (By Mr. Kay): Mr. Smith, this is an item here for the Alaska Plumbing and Heating Company in the amount of \$1,788.04, does that represent material that went into the construction of this house? A. It does.

Q. Is this a true and correct statement on that account? A. Yes.

Q. You have never questioned it, have you?

A. No.

Q. And the bill for the Ketchikan Spruce Mills in the amount of \$2,717.86, is this correct?

A. So far as I know it is true.

Q. Is that a true and correct statement of the value of the materials?

A. Yes, as far as I know.

(Testimony of Russell W. Smith.)

Q. Mr. Smith, have you ever questioned the Ketchikan Spruce [39] Mills' account?

A. No, I haven't.

Q. (By Mr. Grigsby): I meant to ask you, on this labor account whether or not you have designated the number of hours each man worked?

A. Yes.

Q. Now, did you furnish your bookkeeper with their time from which she made up this account?

A. Yes.

Q. When? A. Every night.

Q. And you kept a time book?

A. No, just working hours from a sheet of paper. Every night she entered into a book from this sheet of paper the number of hours each laborer had worked.

Q. Is this the correct number of hours for each laborer? A. Yes, so far as I know.

Recross-Examination

By Mr. Butcher:

Q. How much an hour were you paying these men, Mr. Smith?

A. The scale set at that time was \$2.56 per hour.

Q. What did you agree to pay them?

A. I agreed that they would receive a bonus if they completed the job and waited until they got their pay and I could collect my money from Audrey Cutting. [40]

But they got \$2.56 if they wanted cash but if they

(Testimony of Russell W. Smith.)

waited until I collected from Audrey Cutting they would get another dime.

Q. Did you ever have any definite arrangements with Arden Bell?

A. He was my layout man and I was going to pay him a little more.

Q. What was your agreement with Arden Bell?

A. I am not sure.

Q. Was it that you agreed to pay him \$2.76 an hour?

A. I am not sure.

Q. You don't remember whether you agreed to pay him ten cents?

A. No.

Q. What was the going carpenter's wage at that time?

A. \$2.56.

Q. Was it discussed between you and these men when they went to work for you what the scale of wages was?

A. Not to my knowledge.

Q. Mr. Smith, when did you commence the construction of that house?

A. I am not sure of the time.

Q. Was it in April or May?

A. I am not sure.

Q. Was it during the months of April, May and June, 1948?

A. I am not positive. [41]

Q. Was it in 1948?

A. Yes.

Q. You entered into the contract for the construction on April 30th, isn't that right?

A. Yes.

Q. Did you commence construction within a few days afterwards?

A. I am not sure.

(Testimony of Russell W. Smith.)

Q. Within a week? A. I think so.

Q. Do you know when you did the last work on the place? A. I am not positive.

Q. Was it in June? A. I think so.

Q. What was the last work done there?

A. Painting.

Q. Was it the painting of the exterior?

A. I am not certain.

Q. You couldn't say? A. No.

Q. Have you any records showing when you completed construction on the work and, if so, where are they?

A. Mr. Kay has all my records as far as I know.

Q. Has he the sheets for every day's work?

A. I think that he has all my wife had to go on.

Q. Where is she? A. In Seattle.

Q. Has she any of the papers with her?

A. I couldn't say.

The Court: How much experience have you had in building houses, Mr. Smith?

A. I have had about twenty years.

Q. (By Mr. Butcher): Mr. Smith, I believe you testified that you wrote the number of hours of work down on a slip of paper and that you gave this to your bookkeeper? A. Yes.

Q. You did that for each man who worked for you? A. Yes.

Q. Was that a separate piece of paper that was kept in each case? A. No, all on one sheet.

Q. Did you indicate opposite the figure the man's name? A. Yes.

(Testimony of Russell W. Smith.)

Q. Were you present each morning when the men went to work? A. Yes.

Q. Is it a fact, Mr. Smith, that you were out around town getting materials together?

A. Yes.

Q. Is it a fact that you were around town during lunch hour [43] and you wouldn't know whether they started or quit on time or not?

A. No.

Q. Did you take the men's own word for the hours worked?

A. I was there each morning and noon at the start of work.

Q. In the case of Besser was he working at all hours and at any time you were around there?

A. He was there at the time I was there.

Q. Did you have any method of checking on the men other than his own statement?

A. I was there. But off and on I would be out looking for materials.

Q. You stated you would be gone several hours?

A. I don't believe I said several hours—part of the time, yes, to keep materials on the job.

Q. Did you do more hunting than you did working? A. No, I wouldn't say that I did.

Q. You believe that each man reported a true picture of the number of hours worked and you were satisfied with it, isn't that correct?

A. The men who worked would hand me the slips and I made them out myself. They quit at twelve and were there until they left at night.

(Testimony of Russell W. Smith.)

Q. You were not there between some of these hours but you were satisfied that they had been working the number of hours [44] stated and that they were not working on the job next door at the same time they were working on this job?

A. Yes.

Q. You are certain Mr. Besser didn't work on the job next door at the same time he was working for you?

A. Couldn't know about that.

Q. Couldn't know about Mr. Bullerdick without looking at your records, is that correct?

A. No. I just about completed with the Audrey Cutting job when I started on the Seifert job.

Q. Isn't it a fact you pulled men off the Cutting job and took them over and finished the Seifert job?

A. No, that isn't true.

Q. You never pulled Bullerdick for an hour to——

A. No.

Q. Did you add up the total number of hours each day and did you compute them before you gave them to the bookkeeper?

A. No.

Q. Did you check the bookkeeper in order to see if she was getting an accurate work date of the slips you gave her?

A. I checked them.

Q. When did you check them?

A. At the completion of the job.

Q. Did you check them against the figures on this page?

A. No, I didn't. I didn't have the slips; I destroyed the [45] slips.

(Testimony of Russell W. Smith.)

Q. What did you check them against?

A. I could remember in my mind when the work was done and how many of them were working.

Q. As a matter of fact, Mr. Smith, you wouldn't know whether these figures were accurate because you took your bookkeeper's word for it?

A. Yes.

Q. Your bookkeeper isn't here now? Do you remember the dates you started the Seifert construction?

A. I am not certain.

Q. Do you remember the dates you finished with Audrey's house?

A. I am not certain.

Q. How do you know it was a week; it is just a case of guessing, isn't it, Mr. Smith?

A. Well, the record shows the difference between the time.

Q. I would like to have you examine those names as they appear on this sheet and tell me if any of those worked on the Seifert construction?

A. Yes.

Q. Which men worked on the Seifert construction?

A. Arden Bell, Eddie Rankin, Lloyd Baxley, Lee Runkle.

Q. Four of them worked on the Seifert construction?

A. Yes.

Q. The only two men who didn't were Buller-dick and Besser? [46]

A. As far as I know.

Q. Do you know of a certainty that they did not go back and work on the Cutting property?

(Testimony of Russell W. Smith.)

A. As far as I know they didn't.

Q. Do you have any record which will show when the last day of construction occurred on the Cutting property?

A. The bookkeeper has them and she turned the books over to Mr. Kay.

Q. And did those books show the exact date of the last day of construction?

The Court: The date you actually finished the Cutting house?

The Witness: Yes.

Q. (By Mr. Butcher): Did Audrey ever tell you that certain defects occurred that she expected you to fix and expected you to take care of?

A. I am not certain.

Mr. Butcher: I submit that this witness be called to produce evidence as to the authenticity and accuracy of his records and that he has only relied on a sheet from an account book written by some other party and the figures he has not checked in any adequate way and therefore the exhibit as previously received by the Court is not sufficient to be admitted as an exhibit.

Q. Mr. Smith, isn't there some method by which you can determine [47] when you finished the construction? A. Not except by the books.

Q. You can't accurately find out—haven't you any idea when you finished the house, whether it was in the month of September? A. No.

Q. Do you have any idea whether it was in the summer or the winter?

(Testimony of Russell W. Smith.)

A. It was in the summer.

Q. That would be the summer of 1948?

A. Yes.

Q. Would it have been June, July or August?

A. I don't exactly recall but don't believe it was in June.

Q. Did you apply for a building permit in connection with the Seifert property? A. Yes.

Q. And you did also with the Cutting property?

A. Yes.

Q. Is it not a fact that you had an open account with various merchandisers?

A. The only account I had with them, I showed them the contract which showed that I would get my pay after completion of the house.

Q. How did you separate the materials from the Cutting property, there was no fence between them?

A. There was a fence and each material was put in its proper place.

Q. Didn't you transport various property from lot to lot when you needed a hammer or tool?

A. They didn't all the time I was there.

Q. Did you ever check the material on the list and check it against the material actually received?

A. Yes, and when it came it was all there.

Q. You say that you got every item for which you were billed? A. Yes.

Q. You are satisfied that you got every item for which you were billed? A. Yes.

Q. You never found any inaccuracies?

(Testimony of Russell W. Smith.)

A. Never found any shortage.

(Short recess.)

The Court: Court will stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at five o'clock, p.m., Tuesday, February 8, 1949, the trial was continued until 10 o'clock, a.m. the following day.) [49]

Wednesday February 9, 1949

Mr. Butcher: Your Honor, yesterday I asked that any counsel who had papers pertaining—that these papers be produced up to date. No papers have been furnished me by Mr. Stringer. I ask that he produce them at this time.

Mr. Stringer: Your Honor, I don't recall having any such papers.

Mr. Grigsby: Your Honor, I have a sheet from the Seifert place, if you want it, same form as the one on the Cutting place.

Mr. McCarrey: Your Honor, I would like to inquire as to the relevancy of the matters pertaining to the Seifert property.

The Court: Nothing directly to the Cutting construction but it may have relevancy to what counsel is driving at.

Mr. Butcher: For the Court's information I wish to justify certain bills, including bills for materials and work furnished to the independent contractor to show that such charges to this property

(Testimony of Russell W. Smith.)

were actually for work performed on the Seifert property.

Your Honor, may I have permission to go into the library for a few minutes?

The Court: Permission is granted.

(Short recess.)

Mr. Butcher: Your Honor, we have found the file in the library which contains certain documents which, I believe, we [54] may be able to use at this time.

Recross-Examination

(Continued)

By Mr. Butcher:

Q. Mr. Smith, you had an opportunity overnight to recall papers which may help your recollection as to when you finished the Cutting job.

A. No.

Q. You have no information as to when you commenced the Seifert job? A. No.

Q. If Mrs. Cutting were to testify that you finished her job the first 10 days in July, would that help you to recall? A. I am not sure.

Q. I hand you a copy of a letter addressed to you and ask you to tell the Court what this letter is?

A. It is a letter written to Mr. Seifert.

Q. Written to Mr. Seifert?

A. Yes. It is a letter, a written agreement, stating that at the completion of the work I would pay all the bills. His name is signed to it.

(Testimony of Russell W. Smith.)

Q. What is the date of the letter?

A. The date is June 10, 1948.

Mr. Butcher: I am going to ask that it be marked for identification to establish the time the work was being performed on the Seifert property and we will later offer it in evidence as to when work was completed on the Cutting property.

The Court: Is there no one representing the defendant, [55] Thomas?

Mr. Butcher: Not that I know of.

The Court: It may be marked as Plaintiff's 100 for identification. It is understood that when we refer to the defendant's exhibits we refer to the defendants Henderson and Cutting.

Q. (By Mr. Butcher): Mr. Smith, in examining this picture, did you note the date thereon?

A. June 10th.

Q. June 10th. And if you were working on the Seifert premises on June 10th and were working on the Cutting premises as late as the 10th day of July, one month would elapse between the commencement of the Seifert job and the completion of the Cutting, is that correct? A. I don't understand.

Q. If you were working on the Seifert job on June 10th and didn't finish the Cutting job until July 10th, you were working on both at the same time?

Mr. Grigsby: I object to that as being argumentative.

The Court: Objection sustained.

(Testimony of Russell W. Smith.)

Mr. Butcher: Your Honor, I will offer it at another time.

Mr. Grigsby: I object to its being offered as not being relative to the case. [56]

The Court: Objection is sustained.

Mr. Butcher: I will withdraw the offer at this time, Your Honor, and exhibit it at a later time. I would like to inquire of this witness as to the construction of the porch and any agreement he might have had with Mrs. Cutting over and above the contract?

The Court: You may proceed.

Q. (By Mr. Butcher): You were present in Court and heard about the construction of the porch? A. Yes.

Q. You had previously entered into this contract for \$9800 which you had both signed?

A. Yes.

Q. Regarding construction of the porch, had you asked her if she would consent to the construction of the porch? A. Yes.

Q. Did you set any price on that construction?

A. I said approximately \$400 or more. I wouldn't set any price for it but stated it would be \$400 or more.

Q. Did you make any notations at that time?

A. No.

Q. Were there any other persons present at the time you talked to her about that?

A. Baxley and Lee Runkle. [57]

(Testimony of Russell W. Smith.)

Q. Did you talk it over with Baxley?

A. Yes. Mr. Lee Runkle is outside, but he recalls the conversation.

Q. Did Cutting agree to the verbal contract?

A. Yes.

Q. Did you then proceed to construct that porch? A. Yes.

Q. Did you complete it? A. Yes.

Q. Do you have any figures available which would indicate the cost?

A. No, they are in the records.

Q. Would your record be sufficiently broken down to show you the time and material on that porch? A. I am not certain.

Q. You don't have any other breakdown?

A. No.

Q. You couldn't show the additional cost of that porch, could you? A. No.

Further Redirect Examination

By Mr. Grigsby:

Q. I want to go back to Plaintiff's Exhibit "A," the item for labor on the Cutting residence—Lee Runkle. Did Lee Runkle start work on that construction when the construction [58] commenced?

A. Yes.

Q. Did he work until the construction was finished?

A. Yes, until I drewed him off and put him on the Seifert job.

(Testimony of Russell W. Smith.)

Q. Did you keep a separate work sheet on these men who worked on the Cutting job and on the Seifert job? A. Yes.

Q. The labor on the Seifert job is computed at \$2.56 a hour, isn't it? A. Yes.

Q. There was no agreement about waiting for their money as there was on the Cutting job?

A. No.

Q. Did you go back and forth to work with Runkle during that construction?

A. Yes, he came to the house and picked me up every morning.

Q. Did he work on that construction longer than any other?

A. No, he was one of the first men I pulled off. He went to supervise.

Q. Did you notice his time book?

A. No, he never showed it to me.

Q. You state the contract was dated April 30th, isn't that correct? A. Yes. [59]

Q. Did you go to work on that construction within a few days after that? A. Yes.

Q. Could you say, Mr. Smith, from having come back and forth with Mr. Runkle nearly everyday during that construction that Runkle's time sheet to which he has been credited with 228 hours of labor is correct?

A. Yes, I think that is correct.

Q. Now, in consulting that time on this sheet, is that figured at \$2.66 or \$2.56, or do you recall?

(Testimony of Russell W. Smith.)

A. This has been figured out at \$2.56.

Q. And the agreement was that if he were to wait until the job was completed that he got an additional ten-cents an hour?

A. Yes, sir.

Q. Did Baxley go to work when work was commenced?

A. Yes.

Q. About the same time as Runkle?

A. Approximately the same time.

Q. You have filed a lien claim for the amount of your contract against this property, didn't you?

A. Yes.

Q. Is this your signature?

A. Yes, it is.

Q. And in this statement you state that the last day on which you claim to have worked and furnished supplies under [60] this contract as afore-said was June 19, 1948, would that refresh your memory as to when that job was completed?

A. Yes.

Q. Did you furnish Mr. Stringer with that job sheet at that time?

A. It came from Kay's office, I am not sure.

Q. Can you state when was the last day you worked on the construction of the Cutting residence?

A. No, I couldn't, off-hand.

Q. Is this correct in your statement, the 19th?

A. As far as I know.

Q. Did you work on it any in July?

A. No.

Mr. Grigsby: We offer this in evidence in order

(Testimony of Russell W. Smith.)

to clarify the matter, showing the work and material charged to the Seifert residence.

Mr. Butcher: No objection.

The Court: How soon after you received the letter from Mr. Seifert did you start work on the Seifert property?

The Witness: Right immediately.

Mr. Stringer: If the Court please, this claim of lien has been identified. I would like to enter it as Trustee in Intervention Exhibit 2, I believe. The contract was Exhibit 1 of Mr. Smith's.

Q. Mr. Smith, yesterday afternoon you heard Mrs. Cutting [61] testifying?

Mr. Butcher: Under what status is he examining?

Mr. Stringer: Trustee in bankruptcy.

Q. You heard Mrs. Cutting testify yesterday afternoon as to the building of the porch. She testified that the porch would be built for the sum of \$200, do you recall any such conversation as that?

A. No.

Mr. Butcher: Object to as being repetitious.

The Court: Objection overruled.

Q. (By Mr. Stringer): Do you recall what figure was being agreed upon?

A. Approximately four or more.

Q. Did she tell you to go ahead with that construction? A. Yes.

Q. And you did go ahead with that construction?

A. I did.

(Testimony of Russell W. Smith.)

Q. Mr. Smith, this verbal agreement on the building of a porch was entered into sometime subsequent to the written contract? A. Yes.

Q. Now in this claim of lien you state that the work was completed and the materials all furnished sometime before June 19, 1948. That would be the date of the completion of the house. Was that house completed on that date or was there [62] anything left to be done?

A. When the keys were turned over to her there was nothing left to be done.

Q. You turned the keys over to her?

A. Yes, I turned over one key.

Q. Did she promise to pay you any money?

A. She paid me \$150. She said as soon as her FHA loan came through she would pay.

Q. How was that amount paid—in cash?

A. That was paid by check.

Q. She accepted the key from you sometime after June 19, 1948? A. Yes.

Q. After the house was finished? A. Yes.

Q. Mr. Smith, in building this house did you comply with the terms of the contract in every respect? A. Yes, sir.

Q. Was the wiring done in accordance with the electrical code? A. It was.

Q. Was it approved by the Building Inspector for the City of Anchorage?

A. The Building Inspector okehed it.

Q. It is in your claim of lien that your addi-

(Testimony of Russell W. Smith.)

tional bill for [63] this porch cost \$700, is that correct? A. Yes, as far as I know.

Q. You don't know what the scale for the area of that porch would be, do you?

A. Not off-hand.

Mr. Stringer: That is all.

Q. (By Mr. Grigsby): Mr. Smith, Mr. Butcher asked you about Mr. William Besser working on the Seifert house. I believe you stated that he did not work on the Seifert job at all. What is that paper?

A. That is Mr. Besser's withholding tax statement.

Q. That shows a total of \$64 before payroll deductions? A. Yes.

Q. And that was work done on the Cutting residence? A. Yes.

Q. Dates May 18th to May 21st? A. Yes.

Mr. Grigsby: We offer that in evidence.

The Court: It will be marked plaintiff's exhibit 3.

Q. (By Mr. Davis): Mr. Smith, in connection with building that house, we have called it here the Cutting house, did you purchase certain materials from the Wolfe Hardware? A. I did.

Q. In the course of constructing that house did you have [64] certain work and materials from Ken Hinchey?

A. He did the excavating for us. This consisted of a full basement and the work for the water and the fuel lines in the area.

(Testimony of Russell W. Smith.)

Q. Do you know whether or not the excavating might have been done prior to the time that the written contract was signed with Mrs. Cutting?

A. I am not certain.

Q. Do you know whether or not the excavating done by Mr. Hinchey was done approximately at the same time the contract was signed? Was your answer that you don't know or you do know?

A. I don't know.

Q. In dealing with the Wolfe Hardware, Mr. Smith, were your dealings the same as with the Anchorage Sand and Gravel as you have previously testified, that you were the contractor and that you had a contract with Mrs. Cutting?

A. That is correct.

Q. Now, on getting purchases from Wolfe Hardware did you personally pick up those purchases and take them out to the house? A. I did.

Q. At the time you made a purchase at the Wolfe Hardware were you given a slip showing what you purchased? A. Yes. [65]

Q. Were those slips marked "The Cutting Job"? A. Yes.

Q. Did you sign the various purchase order slips as you made each purchase? A. I did.

Q. I hand you a sheaf of papers and ask you if your name appears on these sheets?

A. It does.

Q. Does your signature appear on each of these sheets? A. Yes.

(Testimony of Russell W. Smith.)

Q. Are those duplicates of the bills purchased by you at the Wolfe Hardware? A. Yes.

Q. Are those the materials purchased for the Cutting job at the Wolfe Hardware? A. Yes.

Q. Did all of the materials go into the house called the Cutting house? A. Yes.

Q. Have you been paid anything on account?

A. No, I haven't.

Q. Do these slips represent what you did purchase for the Cutting job? A. Yes.

Mr. Davis: I would like to have this marked for identification. [66]

The Court: It will be marked Wolfe Hardware Exhibit 200.

Q. (By Mr. Davis): Mr. Smith, I call your attention to that particular slip, is that your signature on that particular slip? A. It is.

Q. (By Mr. Kay): Mr. Smith, you seem to feel that there might be some confusion about your testimony yesterday concerning your wife and your bookkeeper referred to as Miss Rowe, is this your wife? A. At the present time.

Q. Those entries are in her handwriting?

A. Yes.

Q. They were made from records supplied by you? A. Yes.

Q. (By Mr. McCarrey): Mr. Smith, were you in Court yesterday when Mr. Waldron and Mr. Harrison testified as to the materials supplied by them? A. Yes.

(Testimony of Russell W. Smith.)

Q. I believe you have listed here on Plaintiff's Exhibit AA an account for Anchorage Sand and Gravel, \$77.15, is that correct?

A. As far as I know it is.

Q. I hand you Exhibits D and E respectively of the intervenors, [67] will you check to see if your name appears on most of those exhibits?

A. My name appears on all except one—on the Cinder Blocks which Lee Runkle authorized for me.

The Court: In every instance was that merchandise received and put into the Cutting House?

The Witness: Yes, Your Honor.

Q. (By Mr. McCarrey): I hand you here a slip from the Anchorage Sand and Gravel and does your name appear on that? A. Yes.

Q. Did all of the merchandise for which you signed here go into the construction of the Cutting house? A. Yes.

Q. (By Mr. Stringer): Mr. Smith, there was some testimony yesterday about the doors not fitting in the Cutting house. At the time you finished the house and turned the key over to her were those doors and windows tight and did they fit properly?

A. As far as I know they seemed perfect and worked with ease.

Q. Did the cupboards and cabinet work? And were they installed properly?

A. In accordance with the contract they were.

Q. Do you recall whether there was any leak in the basement or in the building at the time you finished the house?

(Testimony of Russell W. Smith.)

A. No, I don't. At the time there was one small leak which [68] the plumbing company came back and fixed at their own expense. It was a paint leak in one of the elbows.

Q. How much time elapsed from the completion and the time Mrs. Cutting moved in?

A. I am not certain.

Q. Mr. Smith, do you recall the time you turned the key over to Mrs. Cutting?

A. I can't recall.

Q. Sometime subsequent to June 19, 1948?

A. Yes.

Q. Mr. Smith, the contract provides that the contractor shall be present in person or a duly authorized representative at all times the work is in progress. How much time did you spend searching for materials, were you off and on the job continuously during the course of the work?

A. Some days I was; some days I was there all day and other days I would be gone two or three hours but no longer than two hours at a time.

Q. You also agreed to keep the property free and clear of all liens and pay them promptly. Was your failure to do this because of the fact that Mrs. Cutting failed to pay you?

A. That is correct.

(Short recess.)

(Testimony of Russell W. Smith.)

Further Recross-Examination

By Mr. Butcher: [69]

Q. I believe you testified earlier what the time scale was for carpenters' wages?

A. The going scale at that time was \$2.56.

Q. Who sets this scale? A. The union.

Q. That was \$2.56, did you say?

A. Yes, per hour.

Q. Per hour? A. That is correct.

Q. You agreed to pay more than that, how much more? A. 10 cents per hour.

Q. Did you intend to absolve that yourself or did you intend to charge that against the contract?

A. That was supposed to come out of the building.

Q. In your lien claim is that claim computed on 266 per hour? A. I am not certain.

Q. Is your lien claim an accurate claim? I believe you testified that it was? A. Yes.

Q. Do you know whether the figures on your work sheet secured from your bookkeeper records include the \$2.66 per hour?

A. I am not certain.

Q. Did you have any approval from the union to pay that extra scale?

A. They have no complaint as to how much more I paid above [70] the scale.

Q. That is your own business? A. Yes.

(Testimony of Russell W. Smith.)

Q. Did you have any architectural plans drawn for this building? A. Yes, I did.

Q. Do you have them? A. Yes.

Q. Do they include the porch? A. Yes.

Q. Does it show a list of materials which were required in addition to the regular value for the porch? A. No.

Q. Who drew the drawings?

A. They were drawn by an architect.

Q. Don't they furnish a list of materials?

A. Not unless they are asked for.

Q. It doesn't show the material that went into it? A. No.

The Court: Would you get the plans and give them to counsel?

The Witness: I haven't them here but have them in my house.

The Court: Bring them for the noon recess. [71]

Further Redirect Examination

By Mr. Stringer:

Q. The porch wasn't included in your original contract agreement with Mrs. Cutting?

A. No.

Q. Even though it was included in the plans?

A. No.

The Court: When did you have the plans made, Mr. Smith?

The Witness: I had to get an architect to draw them for me. They were a little late getting on the job so I didn't use them at first.

EUGENE BRADY

called as witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Eugene Brady.

Q. You are known as Gene Brady also?

A. That is right.

Q. Are you one of the persons of the partnership known as Brady's Floor Covering?

A. Yes.

Q. Kennedy Hardware Company is the other partnership? [72]

A. That is right.

Q. Did your firm, Brady's Floor Covering, furnish any material for the construction of the residence built by Russell Smith?

A. Yes, we did.

Q. Have you an account of the material furnished Mr. Smith in connection with that construction?

A. Yes, we have.

Q. Have you it with you?

A. No.

Q. Is this the itemized list of the material furnished?

A. No, this is the Kennedy Hardware.

Q. Is this the correct list of the material furnished on that building?

A. Yes, it is.

Q. What is the total of same?

A. \$474.41.

Q. Do you know that those items on that list was furnished to Mr. Smith on that building?

(Testimony of Eugene Brady.)

A. Yes, I do.

Q. Did you install the goods?

A. No, our men installed them.

Q. Were you out there and can state that it was done?
A. Yes.

Q. Did you see all of it go into the building?

A. Yes.

Q. Has anything been paid on it?

A. Nothing.

Q. Was it charged to Russell Smith and Mrs. Cutting?

A. Mrs. Cutting picked out the colors but it was charged to Russell Smith.

Q. It was charged to Russell Smith and not Mrs. Cutting, is that right?
A. Yes.

Cross-Examination

By Mr. Butcher:

Q. Is the labor included in the total bill?

A. Yes, it is.

The Court: It will be admitted as Plaintiff's Exhibit DD.

Mr. Grigsby: That is all.

Mr. Butcher: No questions.

TED VAN THIEL

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Ted Van Thiel.

Q. Are you one of the firm known as the Kennedy Hardware Company? A. Yes, I am.

Q. Who are the other members of the firm? [74]

A. Bob Reeve, Janice Reeve, Pat Cartee, Jean Cartee, and Patsy Van Thiel.

Q. You have been a partner with Gene Brady and Kennedy's Hardware known as Brady's Floor Covering? A. That is right.

Q. Is the Kennedy Hardware—did you have any transaction with Russell W. Smith to furnish him material for the house of Audrey Cutting?

A. Yes.

Q. Did you furnish material for that construction? A. Yes, we did.

Q. Who ordered it? A. Russell Smith.

Q. Have you an itemized account of it? I will ask you what that is?

A. This is an itemized account covering the transaction with Russell Smith on the Cutting job in the amount of \$112.95.

Q. Between Smith and Kennedy Hardware for the Cutting job? A. Yes.

(Testimony of Ted Van Thiel.)

Q. Do you know of your own knowledge that those materials were furnished?

A. Yes, and that was the only arrangement we had with Smith to furnish materials for that job.

Q. It was charged to Mr. Smith and not Mrs. Cutting? A. Yes. [75]

Q. Where was it delivered?

A. Most of it was picked up?

Q. By whom? A. Mr. Smith.

Q. Did he represent to you that it was for the Cutting job?

A. Yes, we had no other arrangement for any other job.

Q. Has anything been paid on that account?

A. Nothing at all.

Cross-Examination

By Mr. Butcher:

Q. The items were for merchandise only and no labor furnished? A. That is right.

Mr. Grigsby: Like to have this admitted as Exhibit EE.

The Court: There being no objection it will be admitted.

Mr. Butcher: No questions.

RAY BULLERDICK

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Say your full name?

A. Ray Bullerdick.

Q. What is your position or occupation?

A. Carpenter.

Q. For how long have you been a carpenter?

A. I would say intermittently for 40 years.

Q. Do you know Russell Smith?

A. I do.

Q. Did you have any business relations with him
last summer?

A. Employed by him as a carpenter.

Q. On what job?

A. On the job known as the Audrey Cutting job
and then a few days on the Seifert job.

Q. With reference to the Audrey Cutting job
on lot 2, block 37-D of the South Addition of the
City of Anchorage, when did you go to work on
that job?

A. On the morning of May 15, 1948.

Q. And when was the last day you worked on
that job? A. 16th of June, same year.

Q. Have you got a record of the number of hours
you worked? A. I have, sir.

Q. Did you keep that yourself?

A. I did.

(Testimony of Ray Bullerdick.)

Q. How many hours did you work on that job?

A. A total of 236 hours.

Q. Was there a price agreed upon per hour?

A. There was.

Q. What was it?

A. \$2.66 per eight-hour shift. [77]

Q. Was that conditioned on waiting for your money? A. It was, sir.

Q. That was ten cents an hour in excess of the going rate, was that?

A. That is right, sir.

Q. That was a special agreement between you and Mr. Smith, was it? A. Yes, sir.

Q. Have you got the total in dollars in value of your services?

A. Multiplying 236 by \$2.66 it comes to \$623.16.

Q. Is that any overtime computed there?

A. That is computing the time one-time and one-half over forty hours as required by law of union regulations.

Q. That is figured in that way?

A. It is.

Q. I will ask you if you filed a lien securing your claim? A. I did.

Q. Is that your signature?

A. That is my signature.

Mr. Grigsby: We offer it in evidence.

The Court: It may be admitted and marked Exhibit W.

Q. (By Mr. Grigsby): Do you know Mr. Lee Runkle? A. I do. [78]

(Testimony of Ray Bullerdick.)

Q. Was he working there as a carpenter during the time you were working? A. Yes.

Q. Was he on the job when you went there?

A. He was.

Q. Did he continue to work for as long as you did or close to it? A. He did.

Q. Now I will ask you here, what was the condition, do you know, when that building was finished?

A. I couldn't state positively but I believe I did the last carpentry work on the Cutting job.

Q. There was some painting done after that?

A. Yes, painting in the process of finishing—painters were there in process of finishing their work.

Cross-Examination

By Mr. Butcher:

Q. I think you stated that you did the last carpenter's work on the Cutting job?

A. I believe I did. I couldn't swear to it. Maybe one of the other carpenters went over to do some smoothing up.

Q. Do your records show the last day your work was done? A. It does.

Q. Would you look that date up and give it to us?

A. My time book shows the last work done by myself was June [79] 16, 1948.

Q. June 16, 1948, and at that time the painting had not been done?

A. As I recall, painters were finished up. They were in each other's way for several days.

(Testimony of Ray Bullerdick.)

Q. Do you have any recollection of work being performed on the Seifert house on the adjoining lot? A. I do.

Q. At that time you were working on the Cutting job and then worked on the Seifert job, you never returned to the Cutting property?

A. No, sir.

Q. Did you ever go for any purpose such as to unload lumber? A. Not as I recall.

Q. Did you go over to get materials?

A. I did not.

Q. Did you have anything to do with the construction of the fence? A. I did.

Q. In relation to the 16th day of June, when you did your last work, when would you say that this fence was completed?

A. One of the carpenters had been working a few shifts. I couldn't say how many but a few shifts prior to my leaving the Cutting job and my work was helping to complete the picket fence. That is the only work I did on the Seifert property. [80]

Q. You did no work on the house?

A. No.

Q. How far was the house along when you went over there? A. I couldn't say, sir.

Q. Would you know if the basement was in?

A. No basement—I couldn't be sure.

Q. Would you know whether the studding was up and whether the roof was up at that time that you went over to work on the Seifert property?

A. I don't recall.

(Testimony of Ray Bullerdick.)

Q. Does your record show the first day you worked on the Seifert property?

A. June 17, 1948.

Q. The day following your last work on the Cutting property?

A. That is right.

Q. You have no recollection of the degree of construction on the Seifert house itself?

A. No, only that it was pretty well along.

Q. How many men were working with you on the Cutting property?

A. Runkle and Besser and Baxley—four besides myself.

Q. You heard Mr. Smith that he used the same *ground* of carpenters on the other house, did he do any overcharging?

A. Not to my knowledge, sir.

Redirect Examination

By Mr. Stringer: [81]

Q. There has been testimony here that on the Cutting house the doors and windows didn't fit properly and that the house leaked and so on, do you know whether that condition existed when you left the job?

A. The doors, I would say, worked as good as they could be made to considering the fact that it was a new house.

Q. You would say that that was characteristic of a new structure?

A. Yes, I know no way of avoiding that at the

(Testimony of Ray Bullerdick.)

present time. At the time we left everything was working okeh.

Q. The house was complete when you left?

A. Yes, sir.

Q. There has also been testimony that Mr. Smith was away from the job a considerable amount of time while the house was being constructed, do you know how much time he spent away from the job?

A. I wouldn't know the exact amount of time spent on account of rustling materials or going with a truck or car to purchase the materials, but he was there, I would say at least six and one-half hours, possibly seven each working day.

Q. Did he do any of the work himself?

A. He worked as a regular foreman carpenter.

Q. Would you say he spent as much time on the job as other foremen would and did he do as much work as other foremen do? [82]

A. I would state he did a great deal more than the average foreman, in my experience. He was on the job at least as long as the average or longer than average, in my experience.

Mr. Butcher: I ask that that testimony be stricken. There is no denial of the fact that Mr. Smith, the foreman, didn't need to spend any time on the house and this testimony to prove that he was there on the job is immaterial.

The Court: Objection overruled.

Q. (By Mr. Kay): Mr. Bullerdick, during the time that Mr. Smith should be absent from the

(Testimony of Ray Bullerdick.)

job, would you say that you continued to work or did you lay down on the job?

A. We hit the ball.

Q. (By Mr. Grigsby): Have you been paid any money for your work? A. No.

Q. Did you demand your pay from Mr. Smith?

A. Yes.

Recross-Examination

By Mr. Butcher:

Q. You stated in your answer to Mr. Stringer's question that you were—or, rather, Mr. Smith was present on the job and you felt that he was there six and one-half to seven hours a day every day, isn't it a fact that you had certain work laid out in advance? [83] A. That is correct.

Q. Could you tell when he was going and when he was returning? A. Hardly possible.

Q. You are certain that you would know when Mr. Smith was absent and do your work at the same time?

(No response.)

EDWARD C. RANKIN

called as a witness herein, having been duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Edward C. Rankin.

(Testimony of Edward C. Rankin.)

Q. Were you one of the carpenters employed on the construction of the building on lot 2 of block 37-D of the South Addition to the original town-site of Anchorage known as the Cutting residence?

A. Yes.

Q. Who employed you?

A. Russell Smith.

Q. As a carpenter?

A. Yes as a carpenter.

Q. How long did you work there for him?

A. I started the morning of May 17th and the last day I worked was June 12th. [84]

Q. What is that paper there?

A. This is a paper I copied from Russell Smith's time book.

Q. For what purpose?

A. I wanted to check up on my time so I could file my lien.

Q. What is the total hours? A. 186 hours.

Q. Didn't you have an arrangement as to the pay per hour?

A. Yes, he agreed to pay a bonus over the union scale if we would wait for our money until the job was done.

Q. The union scale is how much?

A. \$2.56 per hour.

Q. You filed a line to secure your claim?

A. Yes.

Q. Is this your signature?

A. That is right.

Q. You haven't been paid anything?

(Testimony of Edward C. Rankin.)

A. No.

Mr. Grigsby: We offer this in evidence.

Mr. Butcher: No objection to this, Your Honor, but I do object to the copy secured from Mr. Smith's timebook and I object to the questions asked on it and ask that that be stricken.

The Court: Motion denied. The lien will be admitted as Plaintiff's Exhibit GG.

Q. (By Mr. Grigsby): One other question, Mr. Rankin, did you know Lee Runkle? [85]

A. Yes.

Q. Was he on the job as a carpenter for the time that you worked? A. Yes.

Mr. Grigsby: That is all.

Mr. Butcher: No questions at this time.

ARDEN BELL

called as a witness, having first been duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name? A. Arden Bell.

Q. Mr. Bell, what is your business?

A. Carpenter.

Q. Did you work on the property that has been testified to known as the Cutting residence on lot 2 of block 37-D of the South Addition of the original townsite of Anchorage? A. I did.

Q. When did you start work? A. May 3.

Q. Who hired you?

(Testimony of Arden Bell.)

A. Russell Smith.

Q. When did you quit?

A. I left the job at June 11th at noon. [86]

Q. Was that the last day you worked on the Cutting job? A. Yes.

Q. Did you keep your time? A. I did.

Q. During that period how many hours did you put in? A. 268.

Q. You have on your lien statement 286?

A. That is figuring the overtime as hours.

Q. Figuring time and one-half on this figuring your overtime is 288 hours and your lien claim statement you claim 286 hours, that would include overtime as time and one-half so that you worked at least that length of time on that basis?

A. That is right.

Q. At an agreed wage per hour?

A. Yes, \$2.66.

Q. Have you been paid anything? A. No.

Q. Have you demanded it? A. Yes.

Q. From Mr. Smith? A. Yes.

Q. Did you file a lien to secure your claim?

A. I did.

Q. I believe you stated that you went to work May 3rd? A. Yes. [87]

Q. And your last day was June 11th?

A. Yes.

Q. Is that your signature?

A. That is right.

The Court: It will be admitted as Plaintiff's Exhibit HH.

(Testimony of Arden Bell.)

Q. (By Mr. Grigsby): Mr. Bell, do you know Lee Runkle? A. I do.

Q. Did he work on that job during the period you did? A. He did.

Q. He started the same day?

A. Yes, May 3rd.

Q. Did he quit at the same time?

A. He quit one day before, that would be June 10th.

Q. He was there all of the time? A. Yes.

Mr. Grigsby: That is all.

Mr. Butcher: No questions.

Mr. Davis: If the Court please, I represent here the Wolfe Hardware and Furniture Company and the Ken Hinchey Company. I believe Mr. Butcher will now stipulate with me that the lien claims of my respective parties are correct and that it may be admitted in evidence and that the lien claim as filed are true and that the materials furnished are correct, and that the [88] material was furnished to Mr. Smith and that we are claiming no personal judgment against Mrs. Cutting. That the amount of \$13.60 was expended in filing each of these claims. I believe under these circumstances, Mr. Butcher, it will not be necessary to call any other witness to prove their claim.

Mr. Butcher: That is agreeable.

The Court: They may be admitted and marked as defendants—rather, Wolfe Hardware and Furniture Company and the Ken Hinchey Company Exhibits 201 and 202 respectively.

Mr. Kay: I have consented to making the same stipulation in regard to Alaska Plumbing Company. We claim no personal judgment on that suit against Mrs. Cutting and our dealing was with Mr. Smith, and we stipulate that the materials furnished and the amount is correct.

The Court: The claim of lien will be admitted and marked as Intervenor Alaska Plumbing Exhibit No. 300.

Mr. Grigsby: I would like to offer in evidence the claim of lien of Kennedy Hardware, which I caused to be filed myself and offer it in evidence.

Mr. Butcher: Mr. Grigsby, are you introducing this to show the cost of filing the lien claims?

Mr. Grigsby: It is to show that the lien was filed within the time.

Mr. Butcher: Our stipulation covered that, Mr. Grigsby.

Mr. Grigsby: The notes on the back of the lien is the [89] amount paid for it and which was paid by myself. I will offer it in evidence.

The Court: It will be admitted as Plaintiff's Exhibit II for the Ken Hinchey Hardware.

Mr. Grigsby: And also the claim of lien of Brady's Floor Covering and notation of the amount paid by me.

Mr. Butcher: No objection.

The Court: It may be admitted as Plaintiff's Exhibit JJ.

Mr. Grigsby: I would also like to offer the claim of lien of William Besser and have it admitted in evidence.

Mr. Butcher: No objection.

The Court: It may be admitted as Plaintiff's Exhibit KK.

GEORGE B. GRIGSBY

called as a witness herein, being first duly sworn, testified as follows:

Direct Testimony

Mr. Grigsby: My name is George B. Grigsby, Attorney at Law, Anchorage, Alaska. I would like to testify that my services in the suit of Ray Bullerdick and others for the cases here concerned is reasonably worth the amount of \$750. The claims aggregate \$3500 and there being an immense amount of work involved, especially in getting counsel together to get this case at issue. I think my services are worth \$750.

Mr. Butcher: No cross.

Mr. Grigsby: I would like to offer the lien of Lee Runkle. [90]

Mr. Butcher: No objection.

The Court: It may be admitted as Plaintiff's Exhibit LL.

Mr. Grigsby: There was a stipulation entered into as to the lien claims of the City Electric and the Alaska Paint and Glass that they claim no personal judgments against Mrs. Cutting, that they had no contract with Mrs. Cutting and all dealings were with Mr. Smith and that the liens as filed are filed as a claim of lien upon the property and City Electric lien was offered and admitted

(Testimony of George B. Grigsby.)
as Plaintiff's Exhibit MM and Alaska Paint and Glass offered and admitted as Plaintiff's Exhibit NN.

The Court: They will be so marked and admitted in evidence.

(Noon recess.) [91]

Afternoon Session

LLOYD BAXLEY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Lloyd Baxley.

Q. Are you known as A. L. Baxley?

A. That is right.

Q. Did you work for Russell W. Smith as a carpenter on the Cutting residence?

A. I did.

Q. Did you file a lien for your claim?

A. Yes, sir, I did.

Q. Is that the lien claim and is that your signature? A. Yes, it is.

Q. Now can you state, Mr. Baxley, when you went to work on that Cutting residence?

A. I went to work on May 3rd.

Q. What was the last day you worked?

(Testimony of Lloyd Baxley.)

A. June 10th.

Q. Do you remember how many hours you put in?

A. Yes, sir, I do. That was 268 hours.

Q. What was the agreed wage? [92]

A. \$2.60 cents per hours, ten cents above the union scale.

Q. That was agreed on by Russell Smith?

A. Yes, sir.

Q. He hired you? A. Yes, sir.

Q. Did you furnish any materials?

A. Yes, I did.

Q. What material did you furnish?

A. I furnished 2,000 board feet of two by four lumber.

Q. Did you furnish that for the Cutting residence? A. Yes, sir.

Q. Did you pay for it? A. I did.

Q. Did you pay for it out of your own money?

A. Yes, sir.

Q. Did that go into the construction of the Cutting residence? A. Yes, sir.

Mr. Grigsby: We offer it in evidence.

Mr. Butcher: No objection.

The Court: It—

Mr. Grigsby: For the benefit of counsel I want to state that the number of hours and the rate per hour there is a mistake in the total which reads \$728 for labor, this should be \$788. The total for labor and material is computed correctly. The

(Testimony of Lloyd Baxley.)

amount claimed in the lien is \$728. This should be \$712.88. [93] The total is \$913.88.

The Court: It will be admitted as Plaintiff's Exhibit OO.

Q. (By Mr. Stringer): Mr. Baxley, did you work on that porch which was talked about during the course of the trial? A. Yes.

Q. Were you present at the time Mr. Smith talked to Mrs. Cutting about this subsequent to the time the contract was entered into?

A. Yes, I was.

Q. Do you recall any sum of \$200 mentioned?

A. No, I don't.

Q. Did Mr. Smith state to Mrs. Cutting that he estimated that this porch would cost \$400 or more?

A. That was what I understood is right.

Q. There has been some testimony that the doors and windows didn't fit and the house leaked, do you know anything about this?

A. I didn't know and I do not see how she accounts for it.

Q. Were you there at the time the house was completed?

A. I was there at the time the carpenter's work was completed.

Q. To your knowledge the doors and windows were fitted properly so far as they could be?

A. Yes, sir.

Mr. Butcher: I object. [94]

The Court: Objection sustained. Were you there when the key was turned over?

(Testimony of Lloyd Baxley.)

The Witness: I was not there.

Q. (By Mr. Stringer): How long have you worked in the carpenter's trade?

A. Intermittently for 30 years.

Q. When Mr. Smith was around getting materials for the job and was away from the job, did he tell somebody to look after things while he was gone?

A. Yes, Mr. Runkle or myself.

Q. In other words he left somebody to look after the work?

A. That is right.

Q. (By Mr. Grigsby): Did you know Lee Runkle?

A. Yes, I did.

Q. Did he go to work the same day you did?

A. Yes, sir, he did.

Q. Did you ride with him to work?

A. No, I drove my own car.

Q. Was he working during the entire period you were?

A. Yes, he was.

Cross-Examination

By Mr. Butcher:

Q. You were present during the conversation with relation to the porch? [95]

A. Yes, sir.

Q. Where did it occur?

A. Right where it was to go on.

Q. Do you recall who was there?

A. I don't recall who was along.

Q. You remember only Mrs. Cutting?

A. That is right.

Q. You remember the conversation?

(Testimony of Lloyd Baxley.)

A. Yes, sir.

Q. What time of day was this?

A. It was in the afternoon, I couldn't name the hour.

Q. Were you advising Mr. Smith about the work?

A. No, I wasn't.

Q. Were you standing around and listening to his conversations?

A. We generally talked those things over when there was something that had to be added on.

Q. How long did this conversation occur?

A. Possibly about five minutes and then we went on working.

Q. Did you discuss the conversation with anyone last night?

A. No.

Q. Mr. Smith?

A. No.

Q. If Mr. Smith testified that he talked it over with you last night that would be untrue then?

A. We talked it over yesterday afternoon. [96]

Q. Did he mention the conversation and the figures?

A. I don't recall whether he did or not.

Q. But you remember from your own conversation and knowledge, from your own conversation—knowledge of the conversation—that it was \$400 or more?

A. That is right.

Q. You said in answer to Mr. Stringer's question that when Mr. Smith would go into town they would put you or Mr. Runkle in charge?

A. He would ask one of us, ask whichever one of us was there and if anyone wanted anything they would always ask one of us.

(Testimony of Lloyd Baxley.)

Q. While you were present on the job could anything have gone from the Cutting job to the job next door? A. No, sir.

Q. Can you work on the job next door?

A. Yes.

Q. Did you work on that job when you were working on the Cutting job? A. No, sir.

Q. You stated that both you and Mr. Runkle were put in charge as sub-foremen, do you know of any time when Mr. Runkle was in charge of the job?

A. Not at any particular time, no.

Q. Do you know of any time that Mr. Runkle was in charge of the job? [97] A. I do, yes.

Q. He just happened to be the one nearest?

A. That is right.

Q. Were you ever in Mrs. Cutting's office?

A. Yes, I have been.

Q. During the construction of the job?

A. Yes. She promised to pay the price of this material I furnished for the place and when I went up to collect it she refused to pay it.

Q. You went up to collect for the lumber you had furnished?

A. Yes, she had asked for the material and asked me to go ahead as she would pay me.

Q. Where did that conversation take place?

A. Right here in the postoffice.

Q. You told her you would furnish the material? A. Sure.

(Testimony of Lloyd Baxley.)

Q. In fact the lumber was delivered there and she knows it? A. Yes.

Mr. Grigsby: Object, not claiming any personal judgment against Cutting.

The Court: Overruled.

Q. (By Mr. Butcher): You had furnished this lumber at the request of Mr. Smith? A. Yes.

Q. And was there any special reason why you asked Mrs. Cutting [98] to pay you at this time?

A. Mr. Smith went to her and asked her this question, as far as I can tell you.

Q. You are saying now that Mr. Smith had gone to her previously? I am asking you what do you recall, did Smith tell you to go to Mrs. Cutting?

A. No, he did not. He went himself.

Q. Did he ever tell you to go to Mrs. Cutting?

A. No, he did not. She told me to come to her office and collect.

Q. You had asked her that night in the Federal Building?

A. No, I didn't ask her that night. I merely told her that in order to get the lumber they had given me credit as Mr. Smith's credit was not good and that mine is in good standing and I had furnished the lumber.

Q. She then offered to pay for it?

A. She told me that she would pay for it.

Q. You knew, didn't you, that Smith had a contract for which he was to be paid at the time of the completion of the construction?

(Testimony of Lloyd Baxley.)

A. Yes.

Q. During the construction period you had occasion to go to Mrs. Cutting's office?

A. Yes, on this lumber deal.

Q. That was to collect the money? [99]

A. Yes.

Q. You asked her and she didn't pay you?

A. That is right.

Further Direct Testimony

Mr. Grigsby: I wish to testify that in suit 5088, which is the Brady Floor Covering, Alaska Paint and Glass Company and City Electric of Anchorage, I believe that my legal services are worth the sum of \$350, and in the intervening suit of the Kennedy Hardware Company my legal services are worth the sum of \$100. That is all. Plaintiffs rest.

Mr. Davis: The Court may set my attorney's fees, if any.

Mr. McCarrey: Court may also set my attorney's fees.

RUSSELL W. SMITH

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. McCarrey:

Q. Calling your attention to questions asked you this morning with Reference to the Anchorage Sand

(Testimony of Russell W. Smith.)
and Gravel liens and the Cinder Products Company, were those claims of lien ever paid by you?

A. No.

Q. (By Mr. Grigsby): Mr. Smith, in that sheet you furnished Mr. Kay you have the amounts owing laboring carpenters, was that computation made at \$2.56 an hour? [100] A. I think it was.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Smith, I would like to ask you a question about that \$150 paid by Mrs. Cutting. Mr. Smith, if you recollect my asking you if Mrs. Cutting had ever paid you any money?

A. No, I don't.

Q. Remember when I asked you if the contract was \$9800 and asked if she had paid any part of it?

A. No, I don't.

Q. I asked if Mrs. Cutting had ever paid any money to you and you didn't remember that. What was that payment of \$150?

A. The \$150 was so that she could get permit and the electricity put on the property. It took all of the money.

Q. You got that in a check?

A. Yes, in a check.

Q. Do you recall whether it was a personal check or a business check?

A. From Cutting Realty, I don't recall that.
Mr. Kay: Call Lyle Anderson to the stand.

LYLE ANDERSON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay: [101]

Q. State your name, please?

A. Lyle Anderson.

Mr. Butcher: Is this in connection with Ketchikan Spruce Mills?

Mr. McCarrey: Yes.

Q. Will you state your occupation?

A. Agent for Ketchikan Spruce Mills in Anchorage.

Q. Mr. Anderson, during last May and June, 1948, did the Ketchikan Spruce Mills furnish materials for the construction of a building on a lot described as lot 2, block 37-D of the South Addition, original townsite of the City of Anchorage?

A. They did.

Q. What are these papers?

A. These papers are copies of invoices or sales tickets that we made in our office upon delivery of the materials to this job.

Q. By whom were they prepared?

A. They were prepared by me and by Mr. Goudchaux, our bookkeeper.

Q. From the original tickets?

A. They were made from carbon copies which we keep in our office. The original slip goes to the recipient of the goods.

(Testimony of Lyle Anderson.)

Q. Is that document a true and correct statement of all the items and materials furnished, the dates, the amounts, the values and the costs of each item? [102] A. Yes.

The Court: Marked for identification Exhibit 400.

Mr. McCarrey: I ask that it be admitted in evidence.

Mr. Butcher: No objection.

The Court: It may be admitted.

Q. (By Mr. McCarrey): Now I ask you, Mr. Anderson, have you received any payment for the goods and materials furnished to this job?

A. We have not.

Q. Did you thereafter have occasion to file a lien? A. We did.

Q. I will show you this paper and ask you what it appears to be?

A. This is a copy of a lien which was filed by the Ketchikan Spruce Mills by our bookkeeper, Harry Goudchaux. It is a certified copy.

Q. When does it show that it was filed, Mr. Anderson?

A. It shows it was filed in book 20 at page 886 at 3:50 p.m.

Q. Would you state the amount that appears thereon by reason of materials furnished?

A. \$2,717.86.

Q. Is that a true and correct amount of the cost and price of the goods sold and delivered to this job? A. It is.

(Testimony of Lyle Anderson.)

Q. Has any part ever been paid? [103]

A. No. No part.

Q. Mr. Anderson, I will ask you whether or not the materials furnished appearing on Intervenor's Ketchikan Spruce Mills' Exhibit 400 actually went into construction of the house on lot 2, block 37-D?

A. Yes, it did, as I was very particular to follow this job very closely——

Q. Therefore——

A. ——and I know that every item of material delivered to the job went into the job. I followed it so closely that I refused shipment of certain amounts of lumber because I couldn't see where it was to go into the job.

Q. So you do know that all these items went into the job? A. I do.

Q. Do you know approximately what time this was?

A. It was approximately the first of May Mr. Smith came down to my office.

Q. Mr. Russell Smith?

A. Yes. Mr. Smith showed me a list of material and asked me if we could furnish that material. I checked it over and told him we could.

He stated that he had a contract to build this house. I said, "Well, fine and dandy but in order for us to deliver the material on the job it will have to be charged to the owner." I said, "We cannot charge it to you." And that the owner of the [104] lot will have to make arrangements with

(Testimony of Lyle Anderson.)

us for the purchase of that material. When that is done we will set aside that amount of material and will deliver that when it is called for, which we did. A day or two later than that Mr. Smith came back and said that Mrs. Cutting said it would be all right to charge the material to her, and so I called Mrs. Cutting on the telephone with reference to this and she said yes that she had a contract to have Mr. Smith build her house. And she said that if we would be unable to charge to Mr. Smith that we could look to her for payment. So we agreed to deliver the material.

Q. You had previous conversations with Mrs. Cutting on the 'phone? A. Yes.

Q. How did you reach her?

A. Called her at her office.

Q. Do you recall what these conversations were about?

A. Yes, I called her when we didn't receive payment on this account and told her that we would have to expect payment on the 10th of the month after the billing had been sent in.

Q. Did she offer to pay it at this time?

A. She said it would be done very, very shortly.

Q. Had Mrs. Cutting ever denied owing you this amount? A. No, at no time.

Mr. McCarrey: I would like to have this claim of lien marked for identification as intervenor's Exhibit 401. [105]

Mr. Butcher: No objection.

(Testimony of Lyle Anderson.)

The Court: It will be marked and admitted as Intervenor's Exhibit 401.

Cross-Examination

By Mr. Butcher:

Q. Mr. Anderson, in the course of your conversation with Mr. Smith did you ever discuss the contract with Mr. Cutting?

A. I was never interested in that at all.

Q. Didn't Mr. Smith tell you that he had a contract?

A. I don't recall whether he did on that particular instance or not. He brought the list of material and he explained what it was for. I asked him who it was for.

Q. He told you it was for Audrey Cutting?

A. That is right.

Q. You didn't ask about the contract?

A. No.

Q. You knew at that time that you weren't going to extend any credit to Russell Smith?

A. That is right.

Q. You intended to watch every piece of material that went over there? A. That is right.

Q. Have you had particular experience with this particular contractor and was not going to extend him any credit? [106] A. Yes, sir.

Q. Because of your experience you couldn't let it go? A. That is right.

Q. When you called Mrs. Cutting on the tele-

(Testimony of Lyle Anderson.)

phone you told her that she would have to go good for it?

A. I told her that was the only way we could deliver it. They would be charged to her as owner.

Q. Do you know she was the owner?

A. To the best of my knowledge, yes.

Q. You assumed she was the owner, didn't deny it, you didn't ask that?

A. She said she had a contract with Mr. Smith and that he was building the house for her.

Q. Didn't she state that the contract was to be paid when the house was completed?

A. I never entered into that at all because I wasn't particularly interested.

Q. This was an open account, wasn't it?

A. That is right.

Q. It was delivered over a period of time?

A. That is right.

Q. Do you expect any material delivered should be paid for on or before the 10th?

A. We would expect payment on the 10th of June following delivery in May. [107]

Q. Do you recall from your own knowledge in charging in this account, whose name is placed at the top of the bill?

A. Audrey Cutting is placed at the top of the bill.

Q. Are you certain? A. I am positive.

Q. Does Russell Smith at any time appear?

(Testimony of Lyle Anderson.)

A. At no place unless as a receiver of the material on the page.

Q. Does Mr. Smith ever come and discuss the indebtedness with you?

A. No, not to my knowledge.

Q. Could you produce one of the bills so that we can see for ourselves whether you did actually bill Mrs. Cutting or Mr. Smith?

A. I am sorry. I do not have any with me.

Mr. Kay: We will furnish one this afternoon.

The Witness: I would like to have the statement returned to our office this evening.

Q. (By Mr. Butcher): Would you explain what this paper is?

A. This is a copy of a statement put out by our posting machine. This shows the original account and this was the way it was headed in our ledger sheet.

Q. You made this copy when?

A. This morning. [108]

Mr. Butcher: This may be a little irregular but I would like to call Mr. Kay.

WENDELL W. KAY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. State your name, please?

(Testimony of Wendell W. Kay.)

A. Wendell W. Kay.

Q. You are a practicing lawyer?

A. Yes, sir.

Q. Situated at Anchorage? A. Yes, sir.

Q. Did you prepare bankruptcy proceedings for Mr. Russell Smith? A. I did.

Q. You are familiar with all the debts of Mr. Smith?

A. Not to too many, Mr. Butcher. As a matter of fact, Mr. Smith dealt 80 per cent of his time with our law clerk, Dan Cuddy.

Q. You did examine the papers?

A. I did.

Q. You have some idea of the assets that Mr. Smith had, if any?

A. Without my file I can't state positively.

Q. Did he have any assets? [109]

A. To the best of my recollection he had few and far between. He had a lot of debts.

Q. Did you look on the dates sworn to by Mr. Smith and determine whether the Ketchikan Spruce Mills is shown and what this amount is that is shown?

A. I will do my best. Yes, Mr. Butcher, there is an entry right here for the claim of Ketchikan Spruce, \$2810.29.

Q. Isn't that the same amount claimed by Ketchikan Spruce Mills, \$2,717.86?

A. I believe it is the amount. Could I have the lien claim of the Ketchikan Spruce Mills?

(Testimony of Wendell W. Kay.)

Mr. Butcher: Your Honor, can you tell me approximately the difference between the two?

The Court: I would say off-hand there was about \$92.

Q. (By Mr. Butcher): Now, Mr. Kay, has the bankrupt been adjudicated? A. Yes, sir.

Q. And of your own knowledge as attorney for the bankrupt, has the Ketchikan Spruce put in a claim certifying to the amount owing?

A. I do not believe that the Ketchikan Spruce Mill has filed any claim in the Smith Bankruptcy Claim. I believe they did file a claim in the bankruptcy proceedings with regard to a small item on Seifert's property but that is my recollection.

Q. The amount of claim against the Seifert property, is that [110] \$93?

A. I believe it was \$92.

Q. It would be your recollection that the Seifert claim would be around \$93? A. Yes.

Q. You have no knowledge that Ketchikan Spruce Mill has filed a claim in the bankruptcy proceedings? In as much as the Cutting job is concerned?

A. I don't believe they have.

Q. You don't know? A. No.

Q. Your answer is "No"? A. Yes.

LYLE ANDERSON

called as a witness herein, having previously been duly sworn, resumed the stand and resumed testifying as follows:

Cross-Examination

(Continued.)

By Mr. Butcher:

Q. Mr. Anderson, you brought with you the records that I requested? A. Yes.

Q. I will ask you, Mr. Anderson, if the method of billing as shown by the bill he has before him was the usual procedure? A. Yes, sir. [111]

Mr. Butcher: Your Honor, would you care to look at them?

The Court: Perhaps I had better since some testimony has been given concerning them.

Q. (By Mr. Butcher): Mr. Anderson, would you explain what is shown on this bill dated May 31, 1949, "Sold to Audrey Cutting, 410 H Street"?

A. Total amount \$347.68. At the bottom appears the signature of Russell W. Smith.

Q. Mr. Anderson, did you ever file a certified claim in connection with the bankruptcy of Russell Smith?

A. I believe we filed one claim for less than \$100 in connection with Russall Smith for some work he had done for Major Seifert. We did that in connection with the lien we had filed against Major Seifert's property.

Q. There is an item on Mr. Smith's bookkeeping

(Testimony of Lyle Anderson.)

record showing Ketchikan Spruce Mills, \$92.43, is that the correct amount?

A. I would presume so, although I don't know the exact amount.

Q. Did you file any claim in connection with the Cutting home? A. Absolutely not.

Q. You did not? A. No.

Mr. Stringer: If the Court please, as intervenor in cause A-5087 as Trustee in Bankruptcy the allegations in our complaint filed in Court state that Mr. Smith did file voluntary bankruptcy; [112] that Mr. Stringer was appointed the Trustee on the 12th day of August; that Mr. Russell W. Smith entered into the contract that has been introduced on the 30th day of April. I will stipulate as to this and other items which have been put in evidence.

RUSSELL W. SMITH

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Stringer:

Q. Mr. Smith, in your complaint you have prayed for the sum of \$10,500 for work done and materials and supplies furnished, and services rendered, have you made demand on Mrs. Cutting here for this amount of money? A. No.

Q. You have never asked her to pay?

(Testimony of Russell W. Smith.)

A. I have asked her a few times.

Q. Have you ever received any money from the contract? A. No.

Q. You have testified earlier that this \$10,500 represents \$9800 embraced in the original contract and that there was an additional \$700 for materials and laborers performed after the original contract was entered into, and that \$450 of this \$700 was for building an additional porch on the back of the house? A. That is correct.

Q. What does the remaining \$250 represent?

A. The \$250 left is the blue prints which I had to get.

Q. Who was to furnish them?

A. According to the contract Mrs. Cutting was to pay for the blueprints.

Q. Did she pay for those? A. No.

Q. Who furnished them?

A. I furnished them myself.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Smith, is it not a fact that in a contract entered into by an independent contractor and the owner that it is up to the contractor to get the electricity and start the job going?

A. It is up to both parties.

Q. Was this included in your contract with Mrs. Cutting? A. No, it is not included.

Q. That was independent of it?

(Testimony of Russell W. Smith.)

A. Yes, sir.

Mr. Butcher: That is all. Call Mr. Smith as my own witness.

RUSSELL W. SMITH

again called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Butcher:

Q. Mr. Smith, you have heard considerable testimony previously that among other debts in your bankruptcy was an item which covered the amount owed Ketchikan Spruce Mills on the Cutting job?

A. Yes.

Q. Did you consider, Mr. Smith, did you recognize that as a debt from you to the Ketchikan Spruce Mills?

A. I had to put it in the bankruptcy bill.

Q. You considered that you owed them the money?

A. This—it had to come out of the property somehow.,

Q. Did you discuss it with Mr. Anderson?

A. No, I didn't.

Q. Were you ever called upon by Mr. Anderson to pay that money? A. No.

Q. You have heard Mr. Anderson testify in the witness stand as to his conversations, that he did

(Testimony of Russell W. Smith.)

not look to you to for payment but did look to Mrs. Cutting, is that substantially correct?

A. Yes.

Q. Had any work been performed on the job prior to contract? Prior to the entering into of the contract on April 30th?

A. Not to my knowledge.

Q. Isn't it a fact that you insisted on a contract before doing any work?

A. That is correct. [115]

Q. You drew that contract?

A. The contract was drawn up by McCarrey.

Q. By Mr. McCarrey and at your request?

A. Yes.

Q. Had you had any previous discussions relative to the work to be performed out there with Mrs. Cutting?

A. I had showed her the plans.

Q. How come did you build the house?

A. I was up to her house one day and talking over building and I brought some plans and she picked one out and said that she would like to have it built.

Q. You had some discussion about the place to be built and the relative cost, did you?

A. Yes.

Q. And you came to some meeting of the minds and you decided to put this into a written contract?

A. Yes.

Q. No work had been done prior to this time?

(Testimony of Russell W. Smith.)

A. No.

Q. You are sure of that or could you have sent Ken Hinchey out there at an earlier period before April 30th?

A. I don't remember exactly the date he went out there. He was out on the job a little before I started construction.

Q. In other words he was out there before you started the construction? [116] A. Yes.

Q. Mr. Smith, your lien claim alleges that on the 23rd day of April work was commenced on the property. Your contract wasn't signed until the 30th, does that refresh your mind that you had Ken Hinchey out there before the contract was signed?

A. I am not sure whether it was before.

Q. Could it have been before the contract was signed? A. It could have been.

Q. You must have had some verbal consent on the part of Mrs. Cutting? A. Yes.

Q. When the contract was signed and the figure of \$9800 determined by you, that figure was to cover everything, was it not? A. That is correct.

Q. That figure covered both labor and materials furnished? A. That is correct.

Q. Does that figure, \$10,500, which you are now claiming cover the amount put in your bankruptcy petition—include the amount of \$2,2117 for the Ketchikan Spruce Mills?

A. I am not sure.

(Testimony of Russell W. Smith.)

Q. It did cover it? A. Yes.

Q. If you had received the \$10,500 as you have alleged and [117] demanded, you could have paid off everybody including the Ketchikan Spruce Mills?

A. I couldn't recollect. I would have to see the books.

Q. Within a few days after your finished the construction you went into bankruptcy, did you?

A. Yes.

Q. Did you ever demand the sum of \$13,500?

A. Not to my knowledge.

Q. Do you recall demanding any sum above \$10,500? A. Not to my knowledge.

Q. And you have seen this before, Mr. Smith, do you know of your own knowledge whether the totals represent the figure of \$10,500 or \$12,934?

A. There is no figure on here.

Q. This represents the total amount of work for Mrs. Cutting? A. As far as I know.

Q. You have previously alleged that the amounts are true and accurate. You have demanded the amounts set forth from Mrs. Cutting. Was that amount exceeding \$10,500?

A. I don't recall what they were. The book-keeper handed her the figures.

Q. You don't recall what they were?

A. No.

AUDREY CUTTING

called as a witness herein, being first duly sworn,
testified [118] as follows:

Direct Examination

By Mr. Butcher:

Q. Your name is Audrey Cutting?

A. That is correct.

Q. You are one of the defendants in this action?

A. I am.

Q. You are the mother of Sylvia Henderson?

A. That is correct.

Q. She is a minor? A. Yes.

Q. Her age at the present time?

A. 17.

Q. You know Mr. Smith who has previously testified here? A. Yes, certainly.

Q. You entered into a contract with Mr. Smith, which contract has been admitted in evidence, to construct a certain residence on a lot owned by you? A. That is correct.

Q. Entered into on the 30th day of April?

A. That is correct.

Q. By the terms of that contract, Mr. Smith was to construct a residence according to certain plans and specifications and that you were to pay him a certain price? A. Yes. [119]

Q. That price was \$9,800?

A. That is right.

Q. You had had some dealings in connection

(Testimony of Audrey Cutting.)

with the lot—lot No. 2, block 37-D, South Addition to the original townsite of Anchorage and you had entered into a contract previously to purchase that lot? A. Yes.

Q. Did you enter into that personally or was it with Sylvia Henderson?

A. I can't remember. It seems that it was with her.

Q. You were to keep a signed copy of the contract? A. That is right.

Q. This was drawn by the firm of McCutcheon and Nesbett? A. Yes.

Q. Do you recall any circumstances in connection with the purchase of this lot?

A. The price of the lot was \$1800 and I paid \$300 down and then \$50 a month. The payments were to be \$50 per month plus 6 per cent interest. This contract was made with Mr. Thomas—Ralph Thomas.

Q. Did you make these payments yourself?

A. Yes.

Q. They were not made by your daughter, Sylvia Henderson? A. No.

Q. Was there a deed executed at the time the contract was made? [120]

A. That is correct. The deed was in escrow and put with the bank.

Q. Which bank?

A. Union bank.

Q. You made the payments? A. Yes.

(Testimony of Audrey Cutting.)

Q. You made them in accordance with the due date? A. Yes.

Q. Monthly? A. That is right.

Q. Did you ultimately complete payment for the lot? A. Yes.

Q. Without any break in any payment?

A. I don't believe I missed any payments.

Q. You made the payments then without default? A. Yes.

Q. Was there a default clause?

A. Yes.

Q. What did it provide?

A. It said that in case of default the lot would go back to the original owner.

Mr. Grigsby: Objection.

The Court: Objection sustained.

Q. (By Mr. Butcher): Was there a provision in the contract providing about the [121] taxes?

A. That is correct.

Q. Did you personally pay those taxes?

A. Yes, I did.

Q. Did Mr. Thomas exercise any control or show any interest in the property after the time you entered into the real estate contract?

A. I have only had one visit with Mr. Thomas since that time.

(Short recess.)

Q. (By Mr. Butcher): Mrs. Cutting, do you recall the date you completed payment for the property?

(Testimony of Audrey Cutting.)

A. The contract was paid in full in approximately July 1st, 1948.

Q. You then received delivery of the deed?

A. That is correct.

Q. In whose name is the deed?

A. Sylvia A. Henderson.

Q. Do you have a copy of that deed, Mrs. Henderson? A. Yes, I do, in my files.

Q. Will you look at your papers and try to find a copy of the deed? You have the deed?

A. Yes, I do.

Q. Do you recognize it as a deed which was placed in escrow and executed at the time of the contract? [122]

A. Yes.

Q. Was that deed ever recorded?

A. The deed was recorded on August 4, 1948, at 2:20 p.m.

Q. Who recorded the deed?

A. Rose Walsh.

Q. Who delivered the deed for recording?

A. I did.

Q. It was done at your request?

A. That is correct.

Q. Had you personally received this deed from the bank? A. Yes, sir.

Mr. Butcher: At this time I would like to have this deed marked for identification.

The Court: It may be admitted as Defendant's Exhibit 101.

(Testimony of Audrey Cutting.)

DEFENDANT'S EXHIBIT No. 101

Warranty Deed

This Indenture, made this 30th day of November, 1946, by and between Ralph R. Thomas, of Anchorage, Alaska, party of the first part, and Sylvia A. Henderson, of the same place, party of the second part,

Witnesseth:

That the party of the first part for and in consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, and other good and valuable considerations to him in hand paid this day by the said party of the second part, the receipt of which is hereby acknowledged; has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell and convey unto the said party of the second part, her heirs, assigns, executors and administrators, the following described real property situate in the Territory of Alaska, Third Division, Anchorage Recording Precinct, and more particularly described as follows, to wit:

Lot Two (2) in Block Thirty-Seven D (37-D) of the South Addition to the Townsite of Anchorage, Alaska, according to the map and plat of the Welch Subdivision, which map and plat is on file in the office of the United States Commissioner and Ex-Officio Recorder

(Testimony of Audrey Cutting.)

for Anchorage Recording Precinct, Anchorage,
Alaska,

Together With All and Singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. However, this deed is given under the specific restrictions that the party of the second part will, within a period of two (2) years from the date of this deed, commence construction of a dwelling to cost not less than Five Thousand Dollars (\$5,000.00) and conditioned upon the completion of such dwelling house within a reasonable length of time after its commencement, taking into consideration the availability of materials and labor. In the event that the party of the second part, her heirs or assigns, shall fail, neglect, or refuse to commence the building above described within the time herein limited, or in the event she shall commence the building but not carry the same to completion within a reasonable length of time, then the party of the first part, his heirs or assigns, or any person owning property adjacent to the above-described property shall be entitled to commence and prosecute proceedings at law or in equity against the person or persons violating or attempting to violate the restrictions and conditions above described. Such action may be to prevent the party of the second part, her heirs or assigns, from violating the conditions of this deed or to recover damages for such violation, or for both an injunction or damages.

(Testimony of Audrey Cutting.)

To Have and To Hold the said premises, all and singular, together with the appurtenances and the privileges incident thereto unto the said party of the second part, her heirs and assigns, forever: And the said party of the first part hereby covenants and agrees with said party of the second part that he is the lawful owner of said property; that he has legal right to sell the same, that there are no liens or other encumbrances against said property; and the party of the first part does by these presents warrant and will forever defend said party of the second part, her heirs and assigns, against any and all persons having or claiming any right, title or interest therein by any lawful claim, in the quiet and peaceable possession thereof.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first hereinabove written.

[Seal] /s/ RALPH R. THOMAS.

Witnesses:

/s/ MRS. ALBERTA MOORE,

/s/ MARY JANE SQUYRES.

United States of America

Territory of Alaska—ss.

This Is To Certify that on this 30th day of November, 1946, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally came

(Testimony of Audrey Cutting.)

Ralph R. Thomas, known to me, and known to be the individual named in and who executed the foregoing instrument, and he acknowledged to me that he signed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and official seal the day and year first in this certificate written.

[Seal] /s/ AUDREY CUTTING,
Notary Public in and for
Alaska.

My commission expires: Feb. 28, 1950.

[Two U. S. Internal Revenue 50-Cent Documentary Stamps attached.]

[Endorsed]: Filed August 4, 1948.

Q. (By Mr. Butcher): Before you received this deed you had entered into the building construction contract with Mr. Smith? A. Yes.

Q. What type of building was this?

A. It was to be a home consisting of four rooms and bath and a basement.

Q. And what type construction?

A. Frame.

Q. And had you had previous conversation with Mr. Smith prior to the making of this contract as to what was to be done by the [123] parties?

A. Yes.

(Testimony of Audrey Cutting.)

Q. Were they later set forth?

A. Yes. As a matter of fact the contract was typed twice before signing.

Q. Were there any other agreements in connection with this building that were not set forth in your contract? A. None.

Q. Other than the porch?

(No response.)

Q. Had you placed any of the main parts of the construction out on competitive bids at that time?

A. No, sir.

Q. You dealt only with Mr. Smith?

A. Yes, sir.

Q. He agreed to build the house in accordance with the plans and so forth for the sum of \$9,800?

A. Yes, sir.

Q. You have heard previous testimony in connection with the construction of the porch. Have you ever been requested by Mr. Smith to have this porch built?

A. Yes, Mr. Smith brought it to my attention.

Q. Was this at the beginning or toward the end of construction?

A. It was toward the end. [124]

Q. Did it cause a change or alteration of the plans you had for the house?

A. Yes, it did.

Q. Did you want the porch? A. No.

Q. But you did agree to its being constructed?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Will you tell the Court the amount involved as you recall it?

A. The amount that Mr. Smith and I discussed was no more than \$200. In fact, I informed him that if it were to cost more than \$200 that I did not want him to build it and I certainly did not agree to \$400 or \$500 for a porch. It is only useless space.

Q. Where did this conversation take place?

A. The conversation took place in my office.

Q. Was it in your office that Mr. Smith came to you and told you about the porch?

A. Yes, sir.

Q. Anyone with him? A. No, sir.

Q. He was alone? A. Yes, sir.

Q. Were there any conversations out at the premises? A. No, sir. [125]

Q. There were no conversations as to the cost of constructing the porch?

A. No, there was no financial conversation between Mr. Smith and his employees.

Q. Do you know Mr. Runkle?

A. I am not familiar with anyone except Mr. Baxley.

Q. Was he ever present when you talked with Mr. Smith about this porch? A. No.

Q. You heard Mr. Baxley testify that you had a conversation about some lumber he was furnishing, was this conversation in the post office?

A. Yes.

(Testimony of Audrey Cutting.)

Q. What was this conversation about?

A. Mr. Baxley just confirmed the statement that he had used his two by four lumber on the house.

Q. Did he ever come up to your office and demand payment? A. Yes, he did.

Q. What was the nature of the conversation?

A. I informed Mr. Baxley that inasmuch as that was covered by the contract and that it was not to be payable until the house was completed that I would not pay him at this time.

Q. After you had had these preliminary conversations with Mr. Smith and before the contract was actually drawn, do you know whether you had informed Mr. Smith to perform any work [126] on the premises? A. No.

Q. Did you ever give Mr. Smith consent to start construction before signing the contract?

A. No, I did not.

Q. Do you have any knowledge of Mr. Hinchey going on the premises and doing some excavating as early as the 23rd of April?

A. No, I did not.

Q. Do you know of any construction prior to the signing of the contract? A. No.

Q. Now, I understand that you signed the contract as owner, is that strictly true?

A. Not in a true sense as being owner but being as a guardian.

Q. Every cent that went into the house it was your money? A. Yes.

(Testimony of Audrey Cutting.)

Q. What position do you assume in connection with your daughter?

A. Well, I had been granted custody and was the guardian and I more or less——

Q. In other words you represented her in various capacities? A. That is correct.

Q. Did you ever consult with an attorney at the time this contract was entered into about your legal rights in connection [127] with the premises?

A. Yes, sir.

Q. And did you ever receive any advice about the posting of notices? A. Yes.

Q. What kind of notices were you given advice on? A. I was asked to post lien notices.

Q. Did you post those notices?

A. Yes, sir.

Q. I hand you a piece of paper and ask you to look at it and identify it?

A. It is a lien notice that I had drawn up in my office?

Q. What was the purpose of it?

A. The lien notice was to notify all the subcontractors and laborers and anyone supplying material that I nor my daughter Sylvia Henderson was responsible for any of the liens or bills for the building or construction of this home on lot 2, in block 37-D in the South Addition of the townsite of Anchorage.

Q. And did you put up more than one notice?

A. Yes, there were four notices.

(Testimony of Audrey Cutting.)

Q. Is this one of the notices? A. Yes.

Q. Does your signature appear there?

A. Yes, sir.

Q. Does the signature of your daughter appear there? [128] A. Yes, sir.

Mr. Butcher: I ask that this be admitted as Defendant's Exhibit No.—

The Court: Admitted as Defendant's Exhibit 102.

Q. (By Mr. Butcher): Mrs. Cutting, you say you posted four of these notices?

A. Yes, sir.

Q. You posted them on the date that is shown on that paper?

A. That is the first day of May. Yes, sir.

Q. Do you recall where on the premises you posted these notices and did you post them personally? A. Yes, I did.

Q. Where?

A. I posted one on the box—the carpenter's box and the box that was used by the carpenters. The first notice was nailed on it, as I recall, on a carpenter's box where the carpenters kept their tools and locked them up and generally any other thing they have on the grounds.

Q. Could that have been the contractor's tool box?

A. Yes. There was lumber on the property and two of the notices were nailed on the lumber and the last notice was saved and when the basement

(Testimony of Audrey Cutting.)

was completed it was posted on the middle support beam of the basement.

Q. Did you post that notice yourself?

A. Yes, sir. [129]

Q. Do you recall whether there was a telephone or electrical post on the property?

A. Not right away there wasn't.

Q. Was there ever one on the property?

A. I had to put a post there for a power unit.

Q. Do you recall that post?

A. Yes, I do.

Q. You just used the four notices?

A. That is true.

Mr. Butcher: Is it generally proper to read the lien notice at the time it is introduced?

Lien Notice

Be It Known that I, Audrey Cutting, guardian of Sylvia A. Henderson, a minor child of Anchorage, Alaska, will not be responsible for any liens or bills for the building or construction of home located at and on Lot Two (2) Block Thirty-Seven-D (37-D), South Addition, Anchorage, Alaska. On the 30th day of April, 1948, a contract was entered into by and between Audrey Cutting and Russell W. Smith, contractor, to build a home located on Lot 2, Block 37-D, South Addition, Anchorage, Alaska, according to specifications as covered by contract.

You are hereby notified that Audrey Cutting, and as guardian of minor child, Sylvia A. Henderson,

(Testimony of Audrey Cutting.)

neither, Audrey Cutting nor Sylvia A. Henderson will not be responsible for any liens or bills in the said construction of the above home, arising [130] from the plumbing, or electrical fixtures or work, or material used in construction of home, or labor of any sort.

You are hereby notified that Audrey Cutting and Sylvia A. Henderson will not be responsible for any injuries or deaths to employees arising from the construction of said home by Russell W. Smith, Contractor of Anchorage, Alaska.

Dated this 1st day of May, 1948, at Anchorage, Alaska.

/s/ AUDREY CUTTING,

/s/ SYLVIA A. HENDERSON.

A. The other lien notices, I don't know what happened to them.

Q. Did you look for them?

A. Yes, I have.

Q. On the premises?

A. Yes, that is correct..

Q. Do you recall where you got this notice?

A. I got this in the basement.

Q. Whereabouts in the basement?

A. It was taken down from the pole and Mr. Fox, the gentleman who rented the home after it was completed, found it and then gave it to me.

Q. You got this form after Mr. Fox rented it?

A. Mr. Fox knew that I had considerable arguments and he was present and he himself could see

(Testimony of Audrey Cutting.)

that there had been a number [131] of things that hadn't been done; naturally, anything pertaining to the construction of the house he gathered up and put them on the side for me to keep.

Q. After progress had commenced on the job did you have occasion to discuss with Mr. Smith the procurement of any materials on the job?

A. What do you mean?

Q. Did Mr. Smith have any difficulty getting materials? A. Yes, sir.

Q. Do you recall Mr. Waldron coming to see you about materials? A. Yes, sir.

Q. You heard Mr. Waldron testify that he didn't want to extend any credit to Smith?

A. Yes.

Q. Is that true?

A. No, it is not true.

Q. What did Mr. Waldron discuss with you there?

A. Mr. Waldron came to see me in my office and we discussed quite at length the conditions of the contract and he read the contract and he wanted to know if Mr. Smith had the contract and it was a confirmation of the contract rather than who was going to pay the bill.

Q. Did you ever agree to assume responsibility for the bills for the materials?

A. No, sir. I never agreed to make any particular guarantee [132] on any of the bills.

Q. You showed Mr. Waldron the contract then?

(Testimony of Audrey Cutting.)

A. Yes, sir, Mr. Waldron didn't doubt my ability to pay Mr. Smith.

Q. You heard Mr. Lyle Anderson of the Ketchikan Spruce Mills testify as to the telephone conversation with you in which he discussed the credit of Mr. Smith and asked if you would assume responsibility and what did you tell him under the circumstances?

A. Mr. Anderson called me and I gave him the same particulars of the contract as I had given Mr. Waldron and he just asked me if I were going to pay the contract. He said he would wait on payment by Mr. Smith.

Q. Did you ever get any bills from Mr. Anderson?

A. No, sir, not until after the house was completed and the conversation concerning the liens and he said he was holding me responsible after the construction.

Q. Do you recall when you received the first bill?

A. It was in the latter part of July.

Q. It was after the construction was completed?

A. Yes, sir.

Q. Was there any understanding that you were to pay before the 10th day of June?

A. No, sir.

Q. That didn't occur in the conversation?

A. No, sir. [133]

Q. You made no guarantee to Mr. Anderson as to the payment of these bills?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. Was the progress on the building satisfactory to you? A. Yes, sir.

Q. Did you always find Mr. Smith there?

A. Not always.

Q. You generally had no dissatisfaction with his progress? A. That is right.

Q. What was your first dissatisfaction with the building?

A. Before Mr. Smith presented the bill to me, you remember we had quite a bit of rain somewhere along about that time. There was quite a considerable cloudburst. It rained one day and one night continuously. There was a seeping in the side walls, front and back walls, and not only just through the windows but the bricks themselves, which indicated to me that he hadn't put in waterproofing material on the bricks when they put the bricks up or that the ground hadn't been covered properly around the foundation of the house and which I called to Mr. Smith's attention and we had considerable arguments over it.

Q. Did he agree at that time to take care of the defects?

A. Yes, he had started to—I went over and took his spade and cleaned some of the dirt out around some of the windows. Some of the gravel was showing underneath the porch which would [134] seem to give away unless something was done to support it.

Q. Were they taken care of? A. Partly.

(Testimony of Audrey Cutting.)

Q. Did you ever receive a demand for payment?

A. He demanded his payment.

Q. Do you remember the date?

A. Payment was demanded shortly. We have all been rather confused just on the dates. That is why I asked you this morning as to what dates the liens had been put in on the property by the employees because it was ten days before that that payment had been asked for.

Q. Did he demand the total amount of \$13,500?

A. Yes, and Mr. Smith indicated that he was giving me quite a bargain. He didn't include ten per cent contractor's fees and didn't include his own labor against the place.

Q. Did you offer at that time to give him the \$9,800 plus the \$200 in full settlement in accordance with the terms of your contract?

A. I was willing to give him the \$10,000 and explained what was going on out there that he had considerable work to straighten out besides the basement and I wanted that done before I made any payment of any sort.

Q. Have you always been ready, willing and able to pay it now?

A. Yes, sir. [135]

Q. Are you ready to pay at any time?

A. Yes, at any time.

Q. Has he been able to explain in any way the reason for having exceeded the amount set forth in the contract?

A. No, except that it cost him more than he thought it was going to cost.

(Testimony of Audrey Cutting.)

Q. He didn't ask you to waive the contract?

A. No, sir.

Q. Do you recall anything about who drew the plans for the house?

A. I don't know. Mr. Smith presented the plans to me.

Q. Was there any provision made for a porch in connection with these plans? A. No, sir.

Q. Who examined the plans—yourself?

A. Yes, sir.

Q. Did you ever set forth in writing and agree to have the porch on it? A. No, sir.

Q. That agreement was verbal?

A. Yes, sir.

Q. Were the plans in existence at the time the contract was signed? A. Yes, sir.

Q. Was there any amount or any price marked on the plans? [136] A. No, sir.

The Court: The trial will stand in adjournment until tomorrow morning at 10:00 o'clock, a.m. [137]

Thursday, February 10, 1949

AUDREY CUTTING

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Cross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, this lien notice that you testified about is dated the first day of May, 1948, is

that the date you posted it? A. Yes, sir.

Q. And did you post four of them on that one day? A. Three of them.

Q. And where did you post the first one?

A. The first one was posted on the carpenter's tool box.

Q. Is that the tool chest that remained there during the entire construction?

A. I believe so.

Q. Where was it?

A. It was at the back of the house known as the back half of the lot.

Q. Was it between the house you were building and the house of the Seifert residence?

A. No, I don't say so specially.

Q. Where is the Seifert residence from your residence? A. South. [141]

Q. Was the box on the south end of your lot? The south side toward the Seifert house?

A. No.

Q. Where was it on your lot?

A. On the back half of the lot.

Q. Which direction?

A. Well, it would be a westerly direction.

Q. Your house faces on the east?

A. The lots run east and west.

Q. What street is your house on?

A. H Street.

Q. It faces on H Street, does it?

A. Yes, it faces on H Street.

(Testimony of Audrey Cutting.)

The Court: Which side? Is it on the west side or east side of H Street?

The Witness: It is on the west side of H Street.

Q. (By Mr. Grigsby): You posted one of these notices on the carpenter's tool box?

A. That is correct.

Q. And one on some lumber? A. Yes.

Q. And the third the same day on another lumber pile? A. That is right.

Q. What kind of lumber was it? [142]

A. General lumber, siding, shiplap.

Q. You know you went out and posted these notices on the lot on the same day you wrote them which was on the first of May?

A. That is right.

Q. The day after you signed the contract?

A. That is right.

Q. When did Sylvia Henderson sign it?

A. The day I had it typed.

Q. Did you type it yourself? A. No.

Q. Did a lawyer type it for you? A. No.

Q. Who did type it? A. Mrs. Sollee.

Q. Is she in town now? A. Yes, sir.

Q. Did she type all four statements—four at the same time? A. Yes, sir.

Q. Were they all originals?

A. One original and three copies.

Q. This is an original, is it not?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. And this is the one which was turned over to you by Mr. Fox? A. Yes, sir. [143]

Q. After he moved in? A. Yes, sir.

Q. That was sometime in July, 1948?

A. Yes, he turned that over with some other papers.

Q. This is the one you posted later in the basement?

A. Yes, which was on the middle post.

Q. How long was it after you posted the first three did you post the one in the basement?

A. I just can't recall, some carpenter work—carpenter work hadn't been done in the basement.

Q. Carpenter work hadn't been done in the basement? A. Yes.

Q. Just where did you post it?

A. I posted it several times. It was on the floor and I put it back up again.

Q. And you put it back up again in the same place? A. Yes, sir.

Q. Where was that place in the basement?

A. It was on the middle frame post. That was the beam support for the floor of the basement.

Q. What was the dimensions of it?

A. What do you mean—the dimensions of it?

Q. What was it—six by six or what?

A. I didn't take the measurements of the post, Mr. Grigsby. [144]

Q. Was it big enough to hold the whole paper?

A. What do you mean?

(Testimony of Audrey Cutting.)

Q. So that the paper protruded? Was it protruding or was it in the center?

A. No, it wasn't in the center.

Q. Where was this post?

A. It would be the first post on your way to the middle of the basement. There are only two posts.

Q. Were they in the center?

A. Well, not exactly center, no.

Q. Was there any floor laid when you posted this? A. No.

Q. What did you tack it up with?

A. Tacks.

Q. One at each end as shown here?

A. No, in the middle.

Q. You mean the middle of the end?

A. No, the middle and the top.

Q. There weren't any in the corner?

A. No.

Q. You state that you found it on the floor?

A. That is right.

Q. How many times did you do that?

A. Twice that I know of. It was out in the yard once.

Q. Did you ever call anybody's attention to that notice? [145]

A. Yes, Mr. Smith's. Mr. Smith told me he had posted notices to the effect that he was the contractor on the job.

Q. Say that again, please?

(Testimony of Audrey Cutting.)

A. Mr. Smith stated that he had posted notices around the premises to the effect that he had accepted the contract and was building the house for me.

Q. Where? A. All over the place.

Q. When did you find out he was posting notices?

A. Very soon after the construction started.

Q. But you posted your notices before any construction started on the tool box and lumber piles?

A. It is necessary to post them as fast as possible.

Q. Have you signed this contract on the 30th of April, 1948, and posted one of these notices on the first day of May on the tool box and one on each of two lumber piles? A. Yes, sir.

Q. When did you discover his notices were posted?

A. About the same time that I posted these.

Q. Did you tell him that inasmuch as he saw fit to post notices that you would post them also?

A. Yes, sir.

Q. Because he had posted notices?

A. Not necessarily.

Q. You posted these notices to inform everyone that you had [146] a contract with Mr. Smith and did you discuss this notice with Mr. Smith?

A. Not particularly, not in detail.

Q. Did you inform him that you posted notices

(Testimony of Audrey Cutting.)

to show that you personally wouldn't be responsible?

A. I didn't discuss that with him.

Q. Do you know how long it remained on that tool box? A. No, I don't.

Q. Did you ever see the notice on that tool box?

A. I did pick them up and put them back up again.

Q. Did you put it back on the tool box?

A. I believe so. But I did pick one up and put it back on a lumber pile. In other words, I made every effort to inform all concerned that Mr. Smith was building the house for me and that my daughter and I were not responsible for any bills.

Q. Were these carpenters working out there around this box? A. No, sir.

Q. There was nobody there? A. No.

Q. How often did you go out there?

A. Once in a while I would be going through the neighborhood on errands.

Q. Did you ever tell any carpenter at any time that you wouldn't be responsible for his wages?

A. Yes, sir. [147]

Q. Which one? A. Mr. Baxley.

Q. When did you tell him that?

A. Before the job was begun.

Q. Before the job was started?

A. That is correct.

Q. Before you made the contract?

(Testimony of Audrey Cutting.)

A. No, sir.

Q. After you made the contract?

A. Yes, sir.

Q. Where? A. In my home.

Q. Was that prior to the time that you posted the notices?

A. Oh, yes, that was a month before.

Q. Month before? A. Yes, sir.

Q. Did you ever tell any other carpenter that you wouldn't be responsible for his wages?

A. No, I didn't.

Q. How did you come to be talking to Baxley months before this contract was let to Smith and that you weren't going to be responsible for any claims?

A. Mr. Smith had done other carpenter work for me at my home and through him I came into contact with Mr. Baxley.

Q. And you were discussing a contract on that job at that [148] time?

A. Yes, Mr. Smith approached me about building a home on the lot because of the progress in the City of Anchorage.

Q. And you told Mr. Baxley on that occasion that if you did do it that you wouldn't be responsible?

A. No, I told him that if I had a contract it would be Mr. Smith and that it would be subject to Mr. Smith's orders and directions and not mine.

Q. You told him that you wouldn't be respon-

(Testimony of Audrey Cutting.)

sible for any lien claims and that a contract would be signed by Mr. Smith and that his wages would be paid by Mr. Smith and not by you personally, is that correct? A. That is right.

Q. Did you tell him the property wouldn't be subject to any liens for the wages?

A. No, sir.

Q. Sylvia isn't here now, is she? A. No.

Q. Did you explain to her about the lot?

A. Yes, sir, she knew the property was in her name.

Q. You made a contract to buy 'Thomas' property? A. Yes, sir.

Q. You were having it put in her name?

A. Yes, sir.

Q. To establish an educational fund from the income? [149] A. Yes, sir.

Q. Did she know that you bought it for that purpose? A. Yes, sir.

Q. You never did have any actual interest in that property yourself excepting as representing your daughter?

A. That is right. I made the payments for the lot over. It was a gift for her.

Q. You have no personal interest in the property now? A. No, sir.

Q. Now, Mrs. Cutting, you say at all times that you have been ready to pay \$10,000 in full settlement of the contract and are today? A. Yes, sir.

Q. The only reason you haven't paid is because he wanted more? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Isn't it a fact that you told several of these creditors shortly after this work was done that you could get your FHA loan in a short time and would pay the claims just as soon as you got it?

A. Yes.

Q. Didn't you tell practically all?

A. Yes, sir.

Q. The loan never went through?

A. No, I could get the loan. [150]

Q. Aren't you depending on the loan?

A. No, I am not depending on that. There could be other loans arranged.

Q. You stated that you were able at that time to pay this \$10,000 in settlement of Smith's claim?

A. What I meant is that I could get the money.

Q. You could get it right now?

A. Not within five minutes but I could get it before a week was over.

Q. Are you ready now to bring \$10,000 into this Court as full settlement of Russell Smith's claim?

A. I believe I could, to the best of my knowledge.

Q. You would have to arrange a loan for it?

A. Yes, sir.

Q. Did you ever make any attempt to make such a loan?

A. Yes, it was turned down because of the liens.

Q. Anyway, you can't get the FHA loan now, can you?

A. Yes, I can.

Q. You can get the house you can get it?

(Testimony of Audrey Cutting.)

A. It would take about 30 days.

Q. You couldn't get enough to pay Smith right away?

A. No, I couldn't.

Q. That would depend on whether you could get a loan from FHA, wouldn't it?

A. Not necessarily. [151]

Q. You could get it by Monday morning?

A. Yes, sir.

Q. If that money is used in full settlement of Smith's claim, can you have it here Monday morning?

A. Yes, sir.

Mr. Grigsby: If your Honor please, as counsel representing the various claimants, they will accept that provision that \$10,000 be tendered into this Court to be put into the Clerk's hand, subject to the further order of this Court, in full settlement of the claim against Russell Smith.

Q. Mrs. Cutting, would you be willing to do this?

A. If you wish and if my counsel directs me to do so.

Q. This is continued upon whether your counsel directs you to do so? Mrs. Cutting, whether you tendered this depends on whether Mr. Butcher advises you to do so, is that correct?

A. Yes, if he advises me to do so I will. I am willing to pay Mr. Smith just as the contract provides that I do so.

Q. Mr. Smith through his Trustee has sued you on his contract for \$10,500, hasn't he?

(Testimony of Audrey Cutting.)

A. Yes, sir.

Q. Mr. Smith is willing to accept \$10,000 in settlement of what you owe him on that contract.

A. Yes, sir.

Q. You are willing to pay that amount now, providing——?

A. Providing that my counsel advises me to do so, Mr. Grigsby. [152]

Q. Otherwise you won't?

A. That is correct.

Q. This would settle Mr. Smith's claim for that amount but what of the other liens against the property?

A. I had a contract with Mr. Smith and if I pay Mr. Smith I will expect everybody else to release me also. That is why we are in court, Mr. Grigsby.

Q. If you owe \$2,000 personally you want a receipt? A. I don't owe the \$2,000.

Q. Whatever the Court decides you owe in this matter you will pay, otherwise you won't pay?

A. Yes, sir.

Q. You won't settle with Mr. Smith alone for \$10,000?

A. Not unless the other lien holders are taken care of.

Q. What were the dimensions of that tool box, Mrs. Cutting?

A. I didn't measure the box, Mr. Grigsby. The reason I went out there was to post lien notices.

(Testimony of Audrey Cutting.)

Q. I know you didn't measure it but how big was it?

A. It was quite large enough to hold all of the carpenters' tools.

Q. Is it as big as the Clerk's desk?

A. I would say it would be half of that space anyway.

Q. Is it as big as this desk?

A. Generally speaking, yes.

Q. Was there a lid on it? [153] A. Yes.

Q. Where on the box did you put that notice?

A. On the end.

Q. On the end? A. On the side.

Q. On one of the ends? Anyone that went to get tools would necessarily see it?

A. Yes, sir.

Q. You state that the notice got off there some way and you put it back two or three times?

A. I didn't say it "some way." They were all over the yard.

Q. You would pick up these notices around the yard and put them back? A. Yes, sir.

Q. And during how long a period did you continually keep them posted that way?

A. During all the time of the construction until——

Q. Until it was done?

A. Yes, until it was done.

Q. Were they on the lumber pile all that time?

A. No.

(Testimony of Audrey Cutting.)

Q. In the house all that time?

A. The notices were in the house all that time from the time that I posted them there.

Q. That construction was completed about the middle of [154] June. How late would you say a notice was posted in the basement?

A. Well, it was around in the middle part of May.

Q. It was still there in the middle of May?

A. Yes, sir.

Q. Did you ever see it after the middle part of May?

A. Not that particular one. They were all around.

Q. How long did the one on the tool box stay there?

A. I don't know whether it was the same one.

Q. You say that you had the notice on the tool box towards your property where anyone going for his tools would necessarily see it?

A. That is right.

Q. Was it posted there while the box was on your property?

A. Yes, sir.

Q. (By Mr. Davis): Mrs. Cutting, you said, I believe, in response to Mr. Grigsby's questions that the box was roughly the size of this smaller table here?

A. Well, in general size, yes, but higher than the table.

Q. How high would you say it was?

(Testimony of Audrey Cutting.)

A. While I didn't, as I told Mr. Grigsby——

Q. You saw it, didn't you? A. Yes.

Q. Was it about as high in front of the table at which you [155] are sitting?

A. No, it was higher.

Q. Was it about as high as the Judge's bench?

A. It was higher than that.

Q. High as the door back there? A. No.

Q. How high was it?

A. Generally speaking it would come up to about here.

Q. Describe the box to us?

A. All I know it is a carpenter's tool box where they put their tools.

Q. There was a door on it, presumably, I suppose, to lock it?

A. I don't know the measurements. I just went to post the liens on it.

Q. You observed the box, didn't you?

A. Not too close.

Q. If you observed the box you should be able to describe the box?

A. Well, I think I have done pretty well.

Q. Was it square? A. No.

Q. Was it oblong?

A. If you mean, was it longer than it was wide, yes.

Q. Was it flat on top? [156]

A. Certain portions of it was flat on top but not all of it.

(Testimony of Audrey Cutting.)

Q. Well, describe it, please?

A. It is just hard to say what that box resembled.

Mr. Butcher: I object to further questioning along that line.

The Court: Overruled.

Q. (By Mr. Davis): It might not be a bad idea to have her draw a picture of it. Are you able to do this, Mrs. Cutting?

A. Well, to the best of my ability. I am not an artist.

Q. But you can give us a rough idea of what that box looks like on paper? A. Yes.

Q. What was it constructed of—wood?

A. Yes.

Q. What kind of wood?

A. I didn't observe the type of wood. All I was interested in was the posting of the liens and I knew there was a lot of wood around there going into the construction of the house. That was as far as I was concerned. I don't know how to start. I can't draw it because of the fact of the angle of the door. Perhaps it resembled a small piano box.

Q. That gives us something to work on. You told Mr. Grigsby that it was to the west side of the lot?

A. Yes. [157]

Q. How far from the excavation?

A. It wasn't too far.

Q. Was there any excavation there at the time you posted these notices? A. Yes.

(Testimony of Audrey Cutting.)

Q. No work was done on the house prior to signing the contract?

A. Not to my knowledge.

Q. There may have been some excavation prior to the contract being signed, couldn't there?

A. Not to my knowledge.

Q. Did you know whether any work was done prior to the 30th of April?

A. I think I made the comment after that that I was quite surprised at the amount of work that had been done there so far.

Q. Do you know of your own knowledge whether any excavation was made on that lot prior to the last of April? A. No, I do not.

Q. Do you know whether any was made on the third day of April? A. No, I do not.

Q. You don't know that when you went out there on the 1st of May that the excavation was made? A. Yes, sir. [158]

Q. Was it completed? A. No.

Q. Was it partially completed?

A. Yes, sir.

Q. Was the shovel there? A. Yes, sir.

Q. Is there any possibility that you might be mistaken about the date you posted these notices?

A. Well, I didn't say an exact statement, no.

Q. I think you have stated that you posted them on the first day of May?

A. That is right, because I took them out directly after they were signed.

(Testimony of Audrey Cutting.)

Q. Could it have been as late as the 10th that you posted these notices? A. No, sir.

Q. As late as the 3rd? A. No, sir.

Q. Positively on the first day?

A. Yes, sir.

Q. Will you describe please the lumber piles on which you posted notices? I believe you stated there were two? A. Yes.

Q. Where were they located, please, Mrs. Cutting?

A. Directly opposite from the tool chest. [159]

Q. Were they near the tool chest?

A. They would be considered near. Anything on the lot would be considered near.

Q. About how many feet, roughly, was it from the tool chest to the lumber pile?

A. Well, I wouldn't say.

Q. You are a real estate agent? A. Yes.

Q. You know the size of a lot in Anchorage?

A. Yes.

Q. If you know a lot was 140 deep you must have some idea of relative distance, about how many feet was the tool chest from the lumber piles?

A. Well, they moved the lumber at various times and moved the tool chest at various times.

Q. I am talking about when you posted the notices?

A. All I will say is that it was close.

Q. And anything on the lot is close in your estimation? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Will you tell us what these lumber piles consisted of? A. Lumber.

Q. What kinds? A. All sorts of lumber.

Q. Do you know something about the kind of lumber?

A. Well, shiplap and odds and ends of this and that and what [160] was needed. They were around in two large piles.

Q. The same kind of lumber or different kind?

A. That I wouldn't say.

Q. You don't know? A. I don't know.

Q. How were these notices put up?

A. Just with tacks.

Q. What kind of tacks?

A. It depends on what kind I had with me, like little black tacks.

Q. Did you take a hammer with you?

A. Sometimes.

Q. Do you remember whether you had a hammer with you on the first day of May?

A. Yes, I would say that I had a hammer with me.

Q. Did you then take these notices with you to the lumber piles?

A. Yes, sir, I put them up.

Q. Where on the lumber pile did you put those notices? A. On the end I would say.

Q. Did you tack the notices to one of the boards? A. Yes.

Q. Would you say that it was at the top or middle or down at the bottom?

(Testimony of Audrey Cutting.)

A. It was on the top where everyone could see it. [161]

Q. At various times as that lumber was moved around you state that you would find them and pick them up? A. Yes, sir.

Q. What did these notices contain?

A. Generally speaking they stated that he was the contractor; that he should apply for certain permits, and that he was building the house for me.

Q. Talking about building permits issued by the City did you secure the permits?

A. No, Mr. Smith secured the building permits.

Q. The building permits were posted?

A. I am not sure.

Q. Was the electrical permit in the basement?

A. No, the plumbing permit is there I know, but——

Q. You saw the plumbing permit?

A. Yes.

Q. You don't remember seeing the building permit posted on the property? A. No.

Q. But you did see some notices stating that Mr. Smith was the contractor? A. Yes.

Q. Were these notices posted prior to the time you posted your notices?

A. Mr. Smith said he was going to post notices and I told [162] him I was going to post mine too.

Q. Which notices were posted prior?

A. I don't recall that he posted his notices first, but it seems to me that he was going to post them.

(Testimony of Audrey Cutting.)

Q. Do you know where that tool chest came from? A. No, I don't.

Q. Did it come from Major Seifert's property?

A. No.

Q. Isn't it possible that tool chest wasn't located on your property but was on Major Seifert's?

A. That could be. There was no fence. You can never be sure of a boundary here.

Q. It might have been on his property rather than yours? A. I wouldn't say yes or no.

Q. How about the lumber, is the same thing true as to that?

A. Personally, I think some of the lumber, as I have said, that some of my lumber went into Major Seifert's property.

Q. Was it on Seifert's property or on yours?

A. But it was my lumber.

Q. Please answer my question. I will admit it was your lumber, but was that lumber on Seifert's property or could it have been on yours?

A. It could have been.

Mr. Butcher: Objection.

Mr. Davis: That is all. [163]

Further Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, I want to ask you in so far as these notices are concerned, when you went out there to the lot was there any specific object placed there? A. No, there wasn't.

(Testimony of Audrey Cutting.)

Q. You posted the notices on what you found?

A. Yes, sir.

Q. And the notice posted in the basement, I believe you testified, you posted at a later date and that you posted this in the basement?

A. Yes, sir.

Q. Could the notice on the lumber pile have been seen by anyone who picked up a piece of lumber?

A. Yes, sir.

Q. Could the notice on the tool box been seen by anyone who went to the tool box?

A. Yes.

Q. Was there an outhouse put on the lot for the use of the men?

A. I don't remember an outhouse.

Q. You don't remember that?

A. No, sir.

Q. How well do you recall the day you posted the notices; do you absolutely know those notices were posted on the first day [164] of May?

A. I posted them that day immediately after they were typed.

Q. Is your recollection sufficiently good enough at this time to know offhand if it weren't on the date shown on the notice?

A. I don't remember, it could have been the third day of May.

Q. This is from your recollection?

A. Yes, from my recollection.

Q. As to the location of this box, do you know where the excavation was?

A. Yes.

Q. Was that box directly east of the excavation or was it to one side?

(Testimony of Audrey Cutting.)

A. Well, it wasn't east.

Q. The front of the lot was facing west?

A. The back faces west.

Q. The front of the lot faces east?

A. Yes, sir.

Q. Would this box be directly west of the excavation?

A. Yes, sir.

Q. Would it have been way over to one side?

A. Yes, sir, it was to one side.

Q. Did the house have a back door?

A. Yes, evidently.

Q. Was the back door in the middle?

A. No, on the side. [165]

Q. Was the building in the middle of a lot?

A. No.

Q. Was the house sitting more to one side than the other and more toward the Seifert property?

A. Yes, sir.

Q. If you were to stand directly in the center of the house looking west would that box have been to the right or to your left?

A. Looking from the house towards the alley it would be to the left.

Q. Several feet to the left?

A. It would be several feet.

Q. Would it be to the lot line, as you know it?

A. Yes, it would as they have put up a fence.

It was on my side of the fence.

Q. That is your best recollection now?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Mr. Grigsby: Objection as to being a leading question.

The Court: Objection sustained.

Q. (By Mr. Butcher): About the location of the lumber piles, I think you stated in answer to Mr. Davis' question the lumber was on the other side. Tell us from your own recollection where you think those lumber piles were?

A. I presume they were on my own lot. [166]

Q. Think about it and tell us if it was over the line or on your side of the line?

A. I wouldn't be sure.

Q. Do you know where the fence is located now?

A. Yes, sir.

Q. In relation to the rear of the house and that fence, do you recall where the lumber was?

A. Why, I would say that it was on my side of the lot after the fence was put up, from the general dimensions of it, yes.

Q. Looking west, which side would the lumber be on, the same side as the box or the opposite side?

A. You are speaking of the time the notices were posted?

Q. Yes.

A. Well, the box and the lumber, as I told Mr. Grigsby, were within a short distance of one another.

Q. There were two piles of lumber?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Were they on the opposite sides of the lot?

A. No, all of them at the left-hand side of the house looking out to the east.

Q. Were they closer to the middle of your lot to the box?

A. Well, they were a short distance from the box. They were all in the general same locality.

Q. And on your property?

A. Well, it was evidently my property.

Q. That is your best recollection? [167]

A. Yes, sir.

Q. You didn't take a tape measure and measure it? A. No, sir.

Q. You posted notices in the basement as soon as the post was up? A. Yes, sir.

Q. Is that post buried in the floor?

A. I wouldn't be for sure. It is to hold up the floor of the main floor.

Q. The copy you have identified as being on that post is the copy you saw from time to time on the post or around on the floor? A. Yes.

Q. I believe you stated in answer to Mr. Davis' questions——

Mr. Davis: I don't believe he has any right to relate what she told me.

The Court: Objection sustained.

Q. (By Mr. Butcher): Did you say in answer to Mr. Davis' question that you picked them up several times—the notices up several times?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. How many times did you pick them up?

A. Too many times to remember just how many times. Mr. Davis inquired into excavation work.

Q. When did the excavation work first come to your attention? [168]

A. When I went out to post the notices the first time.

Q. You knew then that the work was actually going on? A. Yes, sir.

Q. That, to your best recollection, is the first time you noticed the excavation?

A. Yes, sir.

Further Recross-Examination

By Mr. Kay:

Q. Mrs. Cutting, you heard Mr. Anderson testify as to that bill for your lumber?

A. Yes, sir.

Q. And you heard Mr. Anderson testify that he sent you a bill on or about June 1st?

A. Yes, sir.

Q. You did not receive any such bill?

A. No, sir.

Q. You never received this bill?

A. No, sir.

Q. Isn't it a fact that shortly after June 1st he asked you for that bill? A. No, sir.

Q. You deny that you ever received a bill from the Ketchikan Spruce for lumber?

A. To my best recollection I did not receive any.

(Testimony of Audrey Cutting.)

Q. Did you make any agreement to pay for your lumber on or [169] before the 10th of each month?

A. No, I never made any agreement with Mr. Anderson.

Q. Mr. Anderson wasn't telling the truth?

A. I would say that.

Q. You are, though? A. Yes, sir.

Q. You state May 1st is the date you posted these notices, is that correct? A. Yes, sir.

Q. You state you dictated them to your stenographer; how could you prepare them?

A. Well, I had a form that I used.

Q. Where did you get your form?

A. I don't recollect. It was written for another job and so I took it along.

Q. What other job was it used on?

A. I don't know that either. I found it in a gutter.

Q. You state you found it in the street?

A. Yes, sir.

Q. You were walking around and picked it up?

A. Yes.

Q. Was that on May 1st that you found that form or sometime previous?

A. Sometime previous.

Q. You got that form out and made a copy of it? [170]

A. I had my secretary make a copy of it.

Q. You just handed that form to her and asked her to prepare a copy? Did that copy have your name on it? A. No, sir.

(Testimony of Audrey Cutting.)

Q. You made some changes on it, then?

A. Yes, sir.

Q. About what time of day was this?

A. I left orders for her to type it and she did in the afternoon.

Q. When did you leave the orders?

A. In the morning.

Q. She typed it sometime during the afternoon?

A. I presume so.

Q. Was that on May 1st, do you recall, Mrs. Cutting?

A. No, I don't. It was on a Saturday.

Q. Does your stenographer work until five o'clock on Saturday?

A. Yes, sir.

Q. Is that Mrs. Sollee?

A. Yes.

Q. Where did you sign the notice?

A. In my home.

Q. Where did Sylvia sign these?

A. In my home.

Q. You had a discussion and explained them to Sylvia?

A. Yes, sir. [171]

Mr. Butcher: Objection.

The Court: Overruled.

Q. (By Mr. Kay): About what time did you decide to drive out to the property?

A. I don't remember, it was during the evening.

Q. Before 10 o'clock?

A. I wouldn't say so, no. It might have been.

Q. After?

A. It might have been.

Q. Did anyone go with you?

(Testimony of Audrey Cutting.)

A. Sylvia went along with me.

Q. I thought you testified you went out there alone?
A. She stayed in the car.

Q. Do you recall now how you signed this in your home and where you were at the time you signed it?

A. I believe I was in the front room.

Q. Where in the front room?

A. On the coffee table in the front room.

Q. Did you sign it first or did Sylvia?

A. I signed it first and then handed it to Sylvia.

Q. Were all four copies signed at the same time?
A. Yes, sir.

Q. Then you took the four copies and you and Sylvia rode out to the property?

A. Yes, to the best of my recollection. [172]

Q. Did you take the tack hammer with you?

A. Yes, sir.

Q. Did you take a box of tacks?

A. Yes, sir.

Q. This was on the evening of May 1st before or after ten o'clock?
A. Yes, sir.

Q. You went up there and found the tool box?

A. Yes.

Q. Was it dark or light out there?

A. We have considerable daylight at that time.

Q. At this time when you were out there was it dark or light?
A. It wasn't dark.

Q. You didn't need a flash?
A. No, sir.

Q. So you tacked it up on the box, is that right?

(Testimony of Audrey Cutting.)

A. Yes, sir.

Q. All four notices that evening?

A. No, only three.

Q. Did you tack up the carbon copies or the originals? A. I couldn't say for sure.

Q. Didn't you testify that you had the original?

A. Yes, sir.

Q. So you tacked up the carbon copies, then, didn't you? A. I didn't say. [173]

Q. And you kept the original, isn't that right?

A. No.

Q. Did you tack up the original or carbon copies? A. I wouldn't say.

Q. You testified that the first time you were out there you were surprised at the amount of work which had been done, what occasioned that surprise?

A. I didn't expect Mr. Smith to get started for more than a week.

Q. How much was done?

A. Part of the excavation.

Q. That surprised you? A. Yes.

Q. That was all that was done? A. Yes.

Q. You are certain that these lumber piles were out there at this time? A. Yes, sir.

Q. You refer to this lumber in answer to Mr. Davis as your lumber?

A. Well, it was lumber for my house.

Q. You had a contract with Mr. Smith?

A. Yes, sir.

Q. You were looking to Mr. Smith for the con-

(Testimony of Audrey Cutting.)

struction? A. Yes, sir. [174]

Q. What was your concern about that lumber, you didn't expect to pay for it, did you?

A. No.

Q. Who was being charged for it?

A. As far as I know Mr. Smith.

Q. What was your concern?

A. I was concerned about this lumber getting into Major Seifert's house.

Q. Didn't you have a firm contract with Mr. Smith? A. Yes.

Q. You looked to him to pay for the lumber, didn't you? A. Yes.

Q. Isn't it a fact that you were concerned about this lumber because you had been billed for the lumber by the Ketchikan Spruce Mills?

A. No, sir.

Q. Mrs. Cutting, you made an earnest search for the contract? Will you tell us where you searched?

A. I have searched all of my office papers and where I usually leave my papers and I am unable to find the contract at this time.

Q. Did you inquire of the Union Bank?

A. Yes, sir.

Q. What day?

A. At the time I was looking for the papers.

Q. That was yesterday?

A. Day before yesterday.

Q. With whom did you talk?

A. Mrs. Crawford.

(Testimony of Audrey Cutting.)

Q. Did you inquire at the offices of McCutcheon and Nesbett? A. Yes.

Q. Who did you talk to there?

A. Mrs. Brooks.

Q. What time of day was that?

A. It was between the Court recess between twelve and two.

Q. Between twelve and two?

A. Yes, yesterday.

Q. Did you inquire as to the whereabouts of Mr. Ralph Thomas to see whether he has a copy of it?

A. I found that the C.A.A. knows — had no knowledge of his whereabouts.

Q. The last you were informed Mr. Thomas was a C.A.A. employee?

A. He was, the last I heard from him.

Q. I believe there was some testimony as to who were the parties to the original contract, who were these parties?

A. Between myself and Mr. Smith.

Q. Yourself and Mr. Thomas?

A. The original parties? I was not sure whether I had signed the contract or my daughter had signed the contract.

Q. Who were the parties to the purchase of the property? [176]

A. Mr. Thomas and my daughter.

Q. You were not a party to that?

A. I wouldn't be sure.

(Testimony of Audrey Cutting.)

Q. You are not certain as to whether you were a party to that contract?

A. No, I wouldn't be certain until I found the contract itself.

Q. You are certain that Sylvia Henderson is a party to that contract?

A. I wouldn't say that she was or wasn't.

Q. Is the deed to Sylvia Henderson?

A. Yes, sir.

Q. Was any deed ever prepared from Ralph Thomas to you? A. Yes, sir.

Q. Certain? A. Yes, sir.

Q. Positive? A. Yes, sir.

Further Redirect Examination

By Mr. Butcher:

Q. You have made a diligent search for this contract? A. Yes, sir.

Q. Do you recall when you made the first search of this contract?

A. It was the first day of the trial. [177]

Q. Did you make any further search?

A. Yes, sir, in fact I have searched both days.

Q. Do you recall whether you made a search yesterday?

A. The first day I searched all my papers at home. Yesterday I looked in the office.

Q. Did you have any conversation with me over the 'phone? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Did you ask me if I had any suggestions where you might search? A. Yes, sir.

Q. Where did I tell you to search?

A. You told me to search in the office and to see if they had a copy in the office of McCutcheon and Nesbett and search my files and I said that I had done that and they hadn't a copy in their files.

Q. When did you talk to Mrs. Brooks and ask her, could it have been yesterday noon?

A. Yes, sir—I am not sure whether it was the day before that or yesterday that I called McCutcheon and Nesbett's office.

Q. Is this lien form which you say you picked up out of the gutter, is that the only one you have ever seen? A. Yes, sir.

Q. You came by that inadvertently as you have testified? A. Yes, sir.

Q. You state you were concerned about the Seifert residence [178] and the material belonging to you, do you recall what period of construction this was on both houses?

A. I would say they were getting along a ways on my house before they started on the Seifert house. It was at that time that some of the employees of my job were going over to the Seifert job.

Q. Did you ever talk to Mr. Smith about the Ketchikan Spruce Mills' account?

A. Yes, I did.

Q. With reference to the bill for materials?

(Testimony of Audrey Cutting.)

A. Yes.

Q. Now, will you tell us how your mail is normally handled? You have a post office box?

A. Yes.

Q. Who has the key?

A. Myself and my secretary.

Q. Do you both pick up mail there?

A. Yes, sir.

Q. Could it have been posted and somehow you never received it?

A. That has happened.

Q. That has happened previously?

A. Yes, sir.

Q. You couldn't recall ever seeing a bill from Ketchikan [179] Spruce Mills?

A. No, sir.

Q. That is, around June 1st?

A. No, sir.

Q. You did get a bill later? A. Yes, sir.

Q. You think that if Mr. Lyle Anderson says otherwise he is mistaken?

A. I think Mr. Anderson is taking the usual precautions.

Further Recross-Examination

By Mr. McCarrey:

Q. Calling your attention to direct examination of Mr. Butcher yesterday with reference to the Alaska Sand and Gravel and the supplies and materials furnished by that company, I believe you stated that Mr. Waldron came to your office, is that correct? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. I believe that you stated Mr. Waldron made a confirmation of the contract between you and Mr. Smith?

A. Yes, sir.

Q. Had any material been taken out to your job prior to Mr. Waldron's coming to your office?

A. That I wouldn't know.

Q. Isn't it a fact that Mr. Waldron stated that he could not give any credit to Mr. Smith?

A. Not those exact words. Mr. Waldron wanted to know just [180] what form of an agreement I had with Mr. Smith. He told me that he personally would not give credit to Mr. Smith but if he had a sound contract he would back Mr. Smith.

Q. He told you that he wouldn't give Smith personally any credit?

A. That is right.

Q. What led you to believe that Mr. Waldron would give Mr. Smith credit if he had a contract?

A. I told him the exact terms and told him that Mr. Smith was not to be paid one cent until it was finished.

Q. What did he say?

A. He didn't doubt my ability to pay the contract when it was finished.

Q. Then Waldron did not give credit to Mr. Smith?

A. He evidently did because the material was there?

Q. He went along with the contract?

A. It was perfectly agreeable that the contract was okeh.

(Testimony of Audrey Cutting.)

Q. Did he not state that he would give you credit but not him?

A. No, he didn't say he was giving me any credit. I told him exactly what the contract included and Mr. Waldron made the comment to wait for his investment in it.

Q. When you say "he" whom do you mean?

A. I mean that Mr. Waldron would be satisfied.

Q. Did he say that? [181]

A. He gave me that impression.

Q. Did he say that?

A. He said that the contract was substantial and that it was a good contract.

Q. When you have reference to a good contract what do you mean?

A. I mean it was well drawn and that the job was okeh.

Q. He did give you credit?

A. No, he gave it to Mr. Smith.

Q. He refused to give it to Mr. Smith?

A. No. Waldron did give Mr. Smith credit provided it was a good, sound contract and the ability of the people with whom he had the contract to pay.

Q. He would not give Smith credit if Smith were doing the contract alone?

A. He would not. He said that he would not give Mr. Smith one cent of credit but as long as he were building the house for me he would.

Q. In other words he looked to you for the \$9800?

(Testimony of Audrey Cutting.)

A. He looked to me for the \$9,800 to satisfy all material claims for the completion of that house.

Q. You understand, that at that time Mr. Waldron didn't have \$9,800 coming?

A. No, Mr. Smith did. I made many statements to Mr. Waldron that he wasn't to expect pay until the entire construction was [182] completed and that his pay was to come out of the \$9,800 which I would pay Mr. Smith at the time the house was completed.

Q. Referring to the contract which you had with Mr. Smith, I believe that you stated that your name was on there and Mr. Smith's only. Your daughter doesn't appear?

A. My name appears there with Mr. Smith's.

Q. Reading from a copy of the contract "This agreement was made this 30th day of April by and between Russell W. Smith, an independent contractor, hereinafter called the "contractor" and Audrey Cutting of Anchorage, Alaska, hereinafter called the "owner." Was it your intent to hold yourself out as the owner when the house was completed?

A. No, it appears only as guardian.

Q. Then why did you state in the contract that you were owner?

A. My daughter wouldn't be of age to sign the contract but I would.

Q. Were all four copies of the claim notices signed? A. Yes.

(Testimony of Audrey Cutting.)

Q. By yourself and Sylvia Henderson?

A. Yes.

Q. I hand you a copy of the Anchorage News published last night and call your attention to the notice in which you state you are selling the whole of lot 2, block 37-D, in the South Addition in the near future. Did you cause that notice to be [183] published?

Mr. Butcher: Objection.

The Court: Overruled.

Q. (By Mr. McCarrey): Is this the same property as is being litigated before the Court?

Mr. Butcher: Your Honor, the property is not being litigated.

Mr. McCarrey: I consider this very material, Your Honor, of material value as there are elements concerned. Furthermore the witness is guardian of Sylvia Henderson and I would like to inquire into the matter.

Mr. Butcher: I think this has nothing to do with the case.

Q. (By Mr. McCarrey): Is this notice the same lot on which the house that we have before the Court at issue is—that we have at issue before the Court? A. Yes, it is.

Q. Are you the guardian of Sylvia Henderson?

A. Yes, sir.

Q. When were you so appointed guardian?

A. Just recently.

Q. January or February of this year?

(Testimony of Audrey Cutting.)

A. I wouldn't be too positive as to the exact date.

Q. You would have to check? [184]

A. Yes.

Q. Was it in December that you instituted proceedings to become guardian? A. Yes, sir.

Q. Sometime subsequent then and in this year you were appointed guardian? A. Yes, sir.

Q. For what purpose did you seek to be appointed guardian of Sylvia Henderson?

A. For the sale of lot 1 in block 26-A of the South Addition, and the possibility of eventually or maybe selling the home on lot 2 in block 37-D of the South Addition.

Q. In what Court were you appointed guardian of Sylvia Henderson?

A. I was under the impression it was under the Court in Nome but I was mistaken so it was recently in the present Court I was appointed at Anchorage.

Q. Have you ever heretofore been appointed guardian?

A. I was given custody of her in Nome. I was under the impression at that time that that would also rule all guardianship matters.

Q. Then you never have been guardian before?

A. No, sir.

(Testimony of Audrey Cutting.)

Further Redirect Examination

By Mr. Butcher: [185]

Q. When you state that you have recently been appointed guardian have you received an order stating that you were appointed?

A. I don't believe the guardianship is completely finished.

Q. Tell the Court about the present effort being made for guardianship?

A. The guardianship was applied for because of my misinformation and the sale of the home and lot 1 in block 26-A and to take care of expenses involved in raising Sylvia.

Q. Who is handling it for you?

A. Mr. Peterson.

Q. Has Mr. Peterson ever advised you that you were now the guardian? A. No.

Q. You do not know whether you are actually the guardian of Sylvia but you do know that the proceedings are in effect to make you the guardian?

A. Yes.

Q. Now in reference to the contract to which you testified that Mr. McCarrey drew, had you discussed with Mr. McCarrey the relation you had to Sylvia and who the owner of the lot was at that time?

A. No. McCarrey knew my daughter and knew that Sylvia was awarded to me in the Court but as to the exact ownership of the property he didn't say he knew about that. [186]

(Testimony of Audrey Cutting.)

Q. He didn't know whether Sylvia was the purchaser or you were?

A. No, I don't believe he did. I did tell him I was building the house for my daughter. He knew that.

Q. Did you tell him that she was a minor?

A. No. Mr. McCarrey knows that my daughter is a minor.

Further Recross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, you state that you inquired of Thomas as to the contract for the purchase of this property? A. Yes, sir.

Q. Where did you see him?

A. I didn't see him.

Q. Where did you inquire of him?

A. At his last address. I have on my files.

Q. You state that you don't know his whereabouts? A. Yes.

Q. You don't know where he is now?

A. No, sir.

Q. You don't know where he is now at all?

A. No.

Q. Do you know where he lived? A. No.

Q. Do you know where he was reached at the time you were dealing with him? [187]

A. C.A.A. quarters.

Q. Do you know where he lived after that?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. That deed to Sylvia Henderson is dated the 30th day of November, 1946? A. Yes, sir.

Q. Who drew it for you?

A. McCutcheon.

Q. At the same time was the contract drawn?

A. Yes.

Q. Who drew it? A. Mr. McCutcheon.

Q. Not Mr. Nesbett?

A. I wouldn't say for sure.

Q. Did you, since this trial started, ask Mr. Nesbett where that contract was?

A. I believe I called the attention of this matter to Mrs. Brooks.

Q. You don't know whether she worked there at the time the contract was drawn?

A. No, she didn't work there.

Mr. Grigsby: That is all the inquiry you have made?

The Witness: I thought that was all that was necessary. That is all of the inquiry I had made but if you wish me to ask, Mr. Grigsby, I will. [188]

Q. (By Mr. McCarrey): Mrs. Cutting, I believe you testified that the contract between you and Mr. Smith was drawn up in our office, is that correct? A. Yes, sir.

Q. Did you ask to have that contract drawn up?

A. No, I don't believe so.

Q. Isn't it a fact that Mr. Smith asked to have that contract drawn? A. Yes, sir.

Q. You have never paid for that contract?

(Testimony of Audrey Cutting.)

A. I thought I sent you a check for it, but if I haven't I am glad you called my attention to it.

The Court: As I understand it, the lot in question is on the west side of H Street?

A. It is on the right-hand side.

The Court: And the Seifert lot is south or north of this lot?

The Witness: Right next door.

The Court: That would be the southerly direction?

The Witness: Yes.

(Noon recess.) [189]

Afternoon Session

The Court: Mr. Butcher has reported that he is indisposed and will not be able to go on with the trial this afternoon. This case will be continued until 10 o'clock, a.m., Monday morning, February 14th. I would like to hear the law argued while the facts are still fresh in my mind.

(Whereupon, at 2:05 p.m., Thursday, February 10, 1949, the trial was continued until 10 o'clock, a.m., Monday, February 14th, 1949.)

United States of America,
Territory of Alaska—ss:

I, Catherine Parsons, certify that I performed as acting official court reporter pursuant to stipulation of counsel in the taking of testimony in the above-named case, held the 8th, 9th and 10th days

of February, 1949, and that my notes were dictated and transcribed under my direction.

/s/ CATHERINE PARSONS.

Dated at Anchorage, Alaska this 22nd day of July, 1948. [191]

Monday, February 14, 1949

The Court: The trial of causes No. 5087 and No. 5088 will now be resumed. We suspended on Thursday. The defendant, Audrey Cutting was on the witness stand. Mrs. Cutting may resume the witness stand for further examination.

AUDREY CUTTING

called as a witness herein, being previously duly sworn, resumed the stand and testified as follows:

Direct Examination

Mr. Butcher: Your Honor, what was the status of the examination? I have forgotten. I believe Mr. McCarrey was examining.

The Court, I believe plaintiff had finished.

Mr. McCarrey: I have finished, Your Honor.

Mr. Butcher: I wonder if I could have the stenographer read the last question or last couple of questions?

The Court: No, sir, because the stenographer isn't here. We have a new reporter this morning. If I had known counsel would ask for it I would have had the other reporter here.

(Testimony of Audrey Cutting.)

Mr. Butcher: Perhaps Mr. McCarrey remembers the subject.

The Court: Mrs. Cutting testified that at first Waldron said he would not give Smith credit but after some discussion between Mrs. Cutting and Waldron, according to her testimony, Waldron was satisfied with the contract between Mrs. Cutting and Waldron and he agreed to "go along" and Mrs. Cutting also testified that she was recently appointed the guardian of Sylvia [4] Henderson. Mr. Butcher, counsel for defendant asked some further question about the appointment of a guardian and as I recall that is where we finished.

Mr. McCarrey: That is what I remember, Your Honor.

Mr. Butcher: I believe, then, that I was endeavoring to determine whether Mrs. Cutting was actually guardian or whether there was just proceeding in process.

The Court: And she was uncertain. She said there were proceedings in court but she doesn't know the precise state of the proceedings. I suppose if that is of any consequence the files can be brought in or some other proof will be given to show just what the status of the guardianship proceedings are at this time.

Q. (By Mr. Butcher): Then I will ask, Mrs. Cutting, during any of the times mentioned in the various complaints and during the construction of this home and the filing of the liens, were you the guardian of Sylvia Henderson?

(Testimony of Audrey Cutting.)

A. I hadn't been appointed by the Court, no.

Q. When did he commence the present proceedings?
A. In December.

Q. In December of 19——? A. 1948.

Q. And you, I believe, testified that Mr. Peterson represented you? [5] A. Yes, sir.

Q. Had you ever in any other Court at any time been appointed guardian for Sylvia Henderson?

A. I was under the impression I was her guardian but I hadn't actually been appointed.

The Court: I beg your pardon?

The Witness: I was under the impression due to it but I had not been appointed officially by the Court.

Q. (By Mr. Butcher): Had any papers been processed in Nome making you guardian?

A. Nothing else but the divorce decree.

Q. Nothing but the divorce decree?

A. Yes, sir.

Q. That is the divorce decree between whom?

A. Between Sylvia's father and myself.

Q. That is Mr. Henderson?

A. Mr. Henderson.

Q. And that divorce decree did that give you custody of Sylvia?

A. Gave me full custody, yes, sir.

Q. Did it give you anything besides custody; did it give you any money?

A. She was allowed \$50.00 per month for her support.

(Testimony of Audrey Cutting.)

Q. When was that decree handed down, do you recall? A. April 16th, 1944.

Q. April 16th, 1944. And was the \$50.00 a month paid? [6] A. Yes, sir.

Mr. Grigsby: What is the materiality of that. We object to it.

The Court: Objection sustained.

Mr. Butcher: Your Honor, may I be heard on the point. I have a reason for it.

The Court: I wish the counsel would ask to be heard before the Court rules. Counsel may be heard nevertheless.

Mr. Butcher: Your Honor, if it appears that Mrs. Cutting over a period of years had received substantial sums of money which she has saved and invested on behalf of her child, Sylvia Henderson, in properties and it so happens that this property which we have under consideration here is one of the properties and that property is a subject of foreclosure proceedings, then it is of interest to the Court, particularly under the law involved, to know whose money actually went into the purchase of the property.

The Court: Very well, Counsel,——

Mr. Grigsby: May I be heard now?

The Court: Yes, surely.

Mr. Grigsby: Now it has been testified that she got \$50.00 a month for the support of the child and presumably if that was paid she did get it for the support. Now if she used her own money to sup-

(Testimony of Audrey Cutting.)

port the child and used that identical money and not the money she got to invest in some fund it might be material [7] that that money is for the support and it is to be applied that way and not to a fund to purchase property with.

The Court: I think the argument of the counsel goes to the weight of the evidence and not the admissibility. If it were shown that the former husband of Mrs. Cutting had left her a million dollars, we will say, Sylvia A. Henderson, a large sum of money, why it might be material and even though the sum is small it may possibly be material, therefore the objection is overruled and the witness may answer. Counsel may restate the question if the witness has forgotten it.

Q. (By Mr. Butcher): You received a sum, I believe you said, of \$50.00 per month?

A. Yes, sir.

Q. Do you remember when that sum was first paid to you, the first month?

A. The first \$50.00 was paid in May, 1944.

Q. Paid in May of 1944 and has it been paid continuously ever since? A. Yes.

Q. Have you any idea as to this date as to how much money has been paid in?

A. Roughly around approximately \$3,000.00.

Q. And what has been your disposition of this money?

A. Well, the disposition, I have allotted it—well,

(Testimony of Audrey Cutting.)

part of it to her support and part of it to various properties and [8] investing it for her for her future.

Q. Did any of that money go into the purchase of lot No. 2 of block 37-D, to your knowledge?

A. Well, yes, I would say it did. Yes.

Q. How did you handle that money, Mrs. Cutting?

A. Well, it was deposited to my trust account here and paid out of the trust account.

The Court: I wonder if counsel will pull the table back a bit so that he doesn't shut off my view of the other counsel.

Q. (By Mr. Butcher): I believe you testified that under the subject of the acquisition of the property—lot D or lot 2—that you paid the sum of \$50.00 per month? A. And interest.

Q. Did you allot the \$50.00 a month you received from your former husband for that purpose? A. Yes, I did.

Q. So that actually the money that this lot was purchased with was money coming from Sylvia's father, Mr. Henderson? A. Yes, sir.

Mr. Kay: I object, Your Honor, to these leading questions.

The Court: Objection is sustained. Counsel has testified, not the witness.

Q. (By Mr. Butcher): You may testify then whether any moneys received from Mr. [9] Henderson went into this present lot?

(Testimony of Audrey Cutting.)

A. Practically all of the money that he sent has went into that lot.

The Court: Did you keep a separate account of this money, Mrs. Cutting? Did you put it in a separate fund in the bank so that it could be distinguished from your money or was this just a mental process of yours?

The Witness: No, it was put in the trust fund that I had in the bank; it was put in my name as a trustee.

The Court: Did this trust fund contain any other funds than that money paid for the support of Sylvia Henderson?

The Witness: That is correct. There were other funds.

The Court: All of the funds which you did business with were put in that fund, weren't they?

The Witness: Yes, sir.

The Court: Counsel can proceed with the examination but it seems to me to be fruitless.

Q. (By Mr. Butcher): Mrs. Cutting, did you keep any kind of record of the various funds in that account? A. Yes, I did.

Q. And the purpose for which they were deposited?

A. Yes, sir, I have to keep a record.

Q. Did you keep a record of any moneys received on behalf of Sylvia and deposited in that fund? [10]

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. And you did this all during the time you have been receiving the \$50.00 a month?

A. Yes, sir.

The Court: Tell me more about this trust fund, what goes into it and what doesn't go into it?

The Witness: All moneys that are taken in as deposits on the various real estate deals I have—any of the moneys that I have to account to that I handle for other people and my daughter is one of them.

The Court: Did you have any other account in the bank?

The Witness: Yes, she has had various accounts in the bank—a savings account in the Union Bank.

The Court: What about yourself, did you have any other account in the bank other than the trust fund account?

The Witness: I did at one time but I don't any more.

The Court: When was that other account closed out?

The Witness: It was closed out last spring.

The Court: Spring of 1948?

The Witness: Yes, sir.

Q. (By Mr. Butcher): Now, Mrs. Cutting, you were not certain previously when you testified as to the manner of the acquisition of this property and you informed counsel and the Court that you would endeavor to make a search for the papers which were executed in connection [11] with the

(Testimony of Audrey Cutting.)

case other than the deed. Were you successful in finding any papers? A. Yes, I was.

Q. What did you find?

A. I found the note that you executed for \$1500.00 and I found the copy of the mortgage.

Q. Copy of a mortgage? Did the finding of the copy of that mortgage refresh your memory as to what actually happened in connection with the purchase of that lot and, if so, what?

A. Well, finding the copy of the mortgage made me realize that it wasn't a real estate contract so therefore it should be a note, so I went through all my papers again and found the income tax receipts.

Q. Have you been to the bank to find out if they had a copy of the original mortgage?

A. Yes, sir.

Q. And I believe you testified previously you called the firm of McCutcheon and Nesbett and asked them? A. Yes, sir.

Q. You searched among your own papers?

A. Yes, sir.

Q. I hand you this paper and ask you to tell me what it is if you know?

A. It is a copy of a mortgage.

Q. A copy of the mortgage between whom? [12]

A. Between Sylvia A. Henderson and Ralph R. Thomas.

Q. And do you know what that mortgage was given for?

(Testimony of Audrey Cutting.)

A. It was a mortgage on lot 2, block 37D of the south addition.

Q. Given by Sylvia Henderson?

A. Yes, sir.

Q. To Ralph Thomas?

A. To Ralph Thomas.

Q. Sylvia Henderson was the mortgagor, was she? A. Yes, sir.

Q. Mr. Thomas was the mortgagee?

A. Yes, sir.

Q. May I have the deed in connection with this case? You will recall that you previously identified this deed as the deed which invested the property in your daughter, Sylvia Henderson?

A. Yes, sir.

Q. Now was this mortgage executed after the deed was signed and delivered?

A. Well, as I recall they were executed both at the same time.

Q. What do you recall about the transaction and circumstances, if you can? Where did it occur and what was the circumstances surrounding the signing of these papers and the issuance of the mortgage, if you remember?

A. Well, the deed was signed first and then the mortgage.

Q. The deed was signed by Mr. Thomas? [13]

A. Yes, sir.

Q. And do you recall where it was signed?

A. It was signed in the law office of McCutcheon and Nesbett.

(Testimony of Audrey Cutting.)

Q. And then this mortgage was prepared?

A. Yes, sir.

Q. Who prepared the mortgage, if you recall?

A. Both Mr. McCutcheon and Nesbett.

Q. Was there a stenographer present?

A. Yes, sir.

Q. Who was the stenographer?

A. Mary Jane Squyres.

Q. Did she type the mortgage?

A. Yes, sir.

Mr. Butcher: Your Honor, I desire at this time to introduce this copy of the mortgage. As Mrs. Cutting testified, she made a search for the original mortgage and it is not to be found but we have a true copy of it which has notations on it and also other evidence which indicates that it is a true copy of the mortgage. We also have the mortgage note which I will introduce later.

The Court: The original mortgage is at the bank still?

Q. (By Mr. Butcher): Mrs. Cutting, did you inquire at the bank for the mortgage?

A. Yes, I did and I found that it wasn't there. In fact the only bank records indicate that it was a mortgage—that it has [14] written across the page Mortgage Not Recorded.

Q. At the bank? A. Yes, sir.

Q. On the bank records? A. Yes, sir.

Q. Who has custody of these records?

A. Mr. Hassman.

(Testimony of Audrey Cutting.)

Q. Is Mr. Hassman in town—in Anchorage?

A. To my last recollection when I was there Saturday he was still in Palmer.

Q. Who has custody of the records in his absence? A. I believe Miss Crawford.

Mr. Butcher: Your Honor, while counsel is examining the mortgage, may I request the court to authorize the issuance of a subpoena duces tecum to the Union Bank to produce such records as they may have in connection with this case?

The Court: Any authorization that is necessary is given now. Is there objection?

Mr. Grigsby: You don't know where the original of this is?

The Witness: No, sir.

Mr. Grigsby: May I see the deed? Was this mortgage and deed executed on the same day?

The Witness: Yes, sir.

Mr. Grigsby: Was this mortgage signed by Sylvia Henderson?

The Witness: Well, it was made out to her so evidently she must have signed it. [15]

The Court: What is that?

The Witness: The mortgage was made out to Sylvia Henderson.

Mr. Grigsby: The mortgage is made out to Mr. Thomas and was signed and purports to be executed by and between Sylvia Henderson and Ralph R. Thomas. You had this done, didn't you?

The Witness: Yes, sir.

(Testimony of Audrey Cutting.)

Mr. Grigsby: Was it signed by Sylvia Henderson?

The Witness: It was signed by Sylvia Henderson.

Mr. Grigsby: Not by yourself as her guardian?

The Witness: No, sir.

Mr. Grigsby: Now, then, you didn't have any contract of purchase with Thomas?

The Witness: No, sir. I believe I specified that I wasn't sure whether it was a contract or a mortgage.

Mr. Grigsby: Please answer the question? I don't believe you are testifying to any such thing. But you know now that there wasn't any contract?

The Witness: That is right.

Mr. Grigsby: Now did you get possession of the property right away?

The Witness: Yes, sir.

Mr. Grigsby: As soon as this deal was made?

The Witness: Yes, sir.

Mr. Grigsby: And you kept up the taxes? [16]

The Witness: Yes, sir.

Mr. Grigsby: Was there any agreement that you should keep up the taxes?

The Witness: No, but I believe the mortgage calls for keeping up taxes and keeping up any insurance if there are any buildings.

Mr. Grigsby: Now, have you got the note?

The Witness: Yes, sir.

Mr. Butcher: I have got the note.

(Testimony of Audrey Cutting.)

Mr. Grigsby: Have you offered it yet?

Mr. Butcher: I am going to offer it immediately.

Mr. Grigsby: This mortgage doesn't contain anything about taxes or insurance?

Mr. Butcher: We have the tax payments, too, Mr. Grigsby, which we are going to introduce.

Mr. Grigsby: You said that the mortgage stipulated the payment of taxes and such, will you see whether it does or not?

The Court: That does not go to its admissibility, Mr. Grigsby, do you object to the introduction of the mortgage—to the copy of the mortgage?

Mr. Grigsby: As far as I am concerned I don't object. I don't know how the rest of the counsel——

The Court: The question is whether there is objection to the admissibility of this instrument? Without objection it is submitted in evidence and marked as Exhibit No. 103. [17]

DEFENDANT'S EXHIBIT No. 103

Mortgage

This Mortgage, made this day of November, 1946, by and between Sylvia A. Henderson, of Anchorage, Alaska, party of the first part, hereinafter referred to as the Mortgagor, and Ralph R. Thomas, party of the second part, hereinafter referred to as the Mortgagee,

(Testimony of Audrey Cutting.)

Witnesseth:

That the mortgagor hereby mortgages to the mortgagee all that certain real property situate in the Territory of Alaska, Third Division, Anchorage Recording Precinct, more particularly described as follows, to wit:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the Townsite of Anchorage, Alaska, according to the map and plat of the Welch Subdivision, which map and plat is on file in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Recording Precinct, Anchorage, Alaska.

[Marginal Note]: 1/1/47, \$60—\$1450. 2/1/47, \$59.67—\$1400.

Together With All and Singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including the rents, issues and profits thereon, for the purpose of securing the performance of the promises and obligations of this mortgage, and the payment of the indebtedness evidence by one certain promissory note of even date herewith, in the principal sum of One Thousand Five Hundred Dollars (\$1,500.00).

The payment of attorney's fees in a reasonable sum to be fixed by the court if any attorney be employed to foreclose this mortgage; also all costs and expenses of suit, and also such sums as said

(Testimony of Audrey Cutting.)

mortgagee may pay as premiums on insurance on said property, or any expenses which the mortgagee may incur to preserve said property, or the title thereof, all of which said sums, including said attorney's fee are hereby declared a lien against said property and are secured hereby.

The mortgagor agrees to keep said property in good condition and repair, and to permit no waste thereof.

In the event of default on the part of the mortgagor herein in the payment of said note, or interest when due, or in event of breach of any of the covenants herein contained, then in that event, the whole of the principal sum herein, together with all other sums, and interest, shall become due and payable immediately.

Every covenant, stipulation and agreement herein contained shall bind and inure to the benefit of said parties, their heirs, executors, administrators and/or assigns.

Witness the hand and seal of the mortgagor the day and year first above written.

Witnesses:

.....
.....

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this day of November, 1946, before me, the undersigned, a Notary

(Testimony of Audrey Cutting.)

Public in and for Alaska, duly commissioned and sworn as such, personally appeared Sylvia A. Henderson, known to me, and known to be the particular individual named in and who executed the foregoing instrument, and acknowledged to me that she signed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and official seal the day and year first in this certificate written.

.....

Notary Public in and for
Alaska.

My commission expires:

You may proceed, Mr. Butcher.

Q. (By Mr. Butcher): I hand you this paper and ask you to state what it is if you know?

A. It is a note for \$1500.00.

Q. Executed between whom?

A. Executed between Ralph R. Thomas and Sylvia A. Henderson and Audrey Cutting.

Q. Does Sylvia Henderson's name appear thereon? A. Yes, sir.

The Court: May I see the note.

Q. (By Mr. Butcher): And is that Sylvia Henderson's signature?

A. Yes, sir, as nearly as I can remember.

Q. Well, do you know whether it is or whether it isn't by looking at it?

(Testimony of Audrey Cutting.)

A. Yes, it is her signature.

Q. What is the date of the note?

A. December 4, 1946.

Q. Do you know if it is the mortgaged note executed in connection with the mortgage which we have been just discussing? A. Yes, sir.

Q. It is? A. Yes, sir.

Mr. Butcher: Your Honor, I offer this note. [18]

The Court: It may be shown to other counsel.

Mr. Grigsby: No objection on my part.

The Court: It may be admitted in evidence and marked Defendant's Exhibit No. 104.

DEFENDANT'S EXHIBIT No. 104

\$1500.00

Dec., 1946.

For value received I promise to pay to Ralph R. Thomas on order One thousand five hundred and no/100 Dollars in Lawful Money of the United States of America with interest thereon in Lawful Money at the rate of eight per cent per year from date until paid payable in monthly installments of not less than \$50.00 in any one payment together with the full amount of interest due on this note at time of payment of each installment. The first payment, to be made on the fourth day of January, 1946, and a like payment on the fourth day of month thereafter, until the whole sum, principal and interest has been paid, if any of said installments are not so paid, the whole of said principal sum and interest, to become immediately due and collectible at

(Testimony of Audrey Cutting.)

the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof I promise to pay such additional sum as the Court may adjudge reasonable as attorneys fees in said suit or action.

Due 194...

At Anchorage, Alaska.

/s/ SYLVIA A. HENDERSON,

/s/ AUDREY CUTTING.

[Marginal Note]: Paid by check 753.

Mr. Butcher, you may proceed.

Mr. Butcher: Your Honor, I need the mortgage.

Q. Now, Mrs. Cutting, I believe you said that this was drawn up for you in the office of McCutcheon and Nesbett? A. Yes, sir.

Q. And it was signed in that office?

A. Yes, sir.

Q. And it was notarized in that office?

A. Yes, sir.

Q. And prior to the signing of this mortgage do you recall whether the deed was delivered to Sylvia Henderson or not?

A. Yes, but all of the papers were left in escrow in the bank.

Q. Well, you answer my question. In the McCutcheon office was there a delivery made of the deed?

(Testimony of Audrey Cutting.)

Mr. Kay: I object, Your Honor, she has answered.

The Court: Overruled.

Q. (By Mr. Butcher): When these papers were executed in the McCutcheon law office was there a delivery of the deed to Sylvia Henderson?

A. There was. [19]

Q. And following that I believe you testified that Sylvia Henderson executed this mortgage?

A. Yes, sir.

Q. And she signed this? A. Yes, sir.

Q. And she signed the note? A. Yes, sir.

Q. And then who took possession of the papers?

A. Well, I don't just recall. They were left in Mr. McCutcheon's office.

Q. And do you know what happened to them after that?

A. They were put in the Union Bank for collection.

Q. And they remained there until the note was paid off? A. Yes, sir.

Q. And then you received all the papers?

A. Yes, sir.

Q. And do you recall whether you received the original mortgage or not?

A. They said they gave me all of the papers that were in the file so I naturally took it for granted that I had the original mortgage.

Q. I believe you stated from the time of this transaction you paid taxes on the property?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. You paid these personally? [20]

A. Yes, sir.

Q. To the City of Anchorage?

A. Yes, sir.

Q. By the way, do you know of any effort made to record the deed at the time the papers were signed?

A. No, I do not.

Q. You don't know anything about that?

(No response.)

Mr. Grigsby: What was that question?

Mr. Butcher: I asked her if she remembered any effort to record the deed at the time it was signed.

Q. I hand you these tax notices from the City of Anchorage and ask you to tell me if you—here is a tax notice for lot 237-D assessed to Ralph R. Thomas and it is for the year payable January 1st, 1948, and I would like you to examine that and tell me if you paid the amount assessed?

A. Yes, I did. It is written here. "Received of Audrey Cutting."

Q. And for whom did you pay those taxes?

A. Paid them for Sylvia.

Mr. Butcher: May I offer these altogether, Your Honor, rather than singly?

The Court: It may be shown to opposing counsel, and they may be offered together as far as I know.

What are these—tax receipts? [21]

Mr. Butcher: Yes, Your Honor.

Mr. Grigsby: We have no objection.

(Testimony of Audrey Cutting.)

The Court: They may be admitted as a unit and stapled together unless counsel has objection.

Mr. Grigsby: No objection to any.

The Court: They may be marked Defendant's 105.

Q. (By Mr. Butcher): Mrs. Cutting, just one further question. Now in connection with your daughter, Sylvia, other than the \$50.00 a month which you testified you receive for Sylvia, do you receive any other source of income for the support of Sylvia? A. No, I support her myself.

Q. You make your own living and support yourself? A. Yes, sir.

Q. Do you have any other dependents?

A. Yes, sir.

Q. Who do you support besides Sylvia?

Mr. Grigsby: What is the materiality of this?

The Court: What is the materiality of it, Mr. Butcher?

Mr. Butcher: To show, Your Honor, that Sylvia Henderson as owner of the property is entirely dependent upon Mrs. Cutting for her support apart from this \$50.00 per month and without Mrs. Cutting's care and support of her she would have no one to look to for a source of livelihood or for support of any kind for her education and health.

The Court: The last question was whether Mrs. Cutting had any other dependents. I think it is wholly irrelevant unless counsel can show me how it has any issue in this case.

(Testimony of Audrey Cutting.)

Mr. Butcher: I think in an equitable action the circumstances of Sylvia Henderson, who is the true owner of this property and against whom the foreclosure must occur, if any, if such property is needed for her education and support and well being in the future and that she has no one else to look to other than her mother, that it would go to the equities.

The Court: Not as to other dependents as I can see it. The objection is sustained.

Mr. Butcher: Withdraw the question. That is all at this time, Your Honor.

The Court: Do other counsel care to examine?

Cross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, now with reference to this transaction, acting for Sylvia Henderson you arranged with Ralph R. Thomas to buy this property for the sum of \$1800? A. Yes, sir.

Q. \$300 down and the balance of payments of \$50 per month? A. Yes, sir.

Q. And you gave them a note for the balance of \$1500? A. And the mortgage.

Q. What is that? [23]

A. And the mortgage.

Q. And a mortgage to secure that note and he gave you a deed? A. Yes, sir.

Q. Now there was no escrow agreement?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. Was the deed and the mortgage both left at Mr. McCutcheon's office? A. Yes, sir.

Q. Was the deed drawn in McCutcheon's office?

A. Yes, sir.

Q. And was Mrs. Albert A. Moore in Mr. McCutcheon's office when she witnessed it?

A. Mrs. Moore was my secretary at the time.

Q. Didn't you say you took this over and executed it in your office? You are the notary on this deed?

A. If you will recall, Mr. Grigsby, at the time of the signing of that deed my office immediately adjoined Mr. McCutcheon's office on the lower floor of the McCutcheon's building.

Q. You are the notary on the deed?

A. Yes, sir.

Q. And then the deed and the mortgage both were left in McCutcheon's office? A. Yes, sir.

Q. Mr. Thomas was there at the time?

A. Yes, sir. [24]

Q. It was the same day?

A. The mortgage was prepared the same day.

Q. As the deed and the note also?

A. Yes, sir.

Q. The note is dated December 4th?

A. Yes, sir.

Q. Which is several days after the date of the deed? A. Yes, sir.

Q. All right, where was that prepared?

A. The note and the mortgage were prepared all in the same office.

(Testimony of Audrey Cutting.)

Q. All right, now, the mortgage was dated the same day as the deed, you say, and it purports on the copy you have to be dated in November blank. When was it executed?

A. Well, the mortgage was executed after the deed was signed.

Q. The same day? A. No.

Q. Well, you just now said it was the same day?

A. No, you asked me if it was prepared the same day.

Q. When was it executed?

A. I wouldn't know. It wasn't on the same day the deed was made.

Q. But it was prepared on the same day?

A. Yes, sir.

Q. On November 30th? [25] A. Yes, sir.

Q. And when was it executed?

(No response.)

Q. What was the arrangement when you got this deed?

A. Well, the mortgage wasn't signed on the same day that the deed was signed. It was not but what day it was signed I wouldn't say for sure. The note says December 4th so I assume the mortgage was signed the same day.

Q. Now, what was the arrangement when you got this deed as to the payment for the property as to whether it would be escrow or a mortgage? Was an arrangement made then that a mortgage would be made?

A. Well, after the deed was signed, yes, there

(Testimony of Audrey Cutting.)

was arrangements made about the mortgage and where it was to be paid.

Q. After the deed was signed? A. Yes, sir.

Q. You didn't have any agreement before that?

A. No, sir.

Q. So Mr. Thomas just left you a deed—an absent deed—without getting a mortgage or note or security whatever?

A. He left the deed with Mr. McCutcheon. He left it in Mr. McCutcheon's care until the mortgage was prepared. He was supposed to come back in and sign it but he didn't that day, so that is what accounts——

Q. He didn't sign the deed that day? [26]

A. He signed the deed that day but not the mortgage.

Q. He came back subsequently and in the meantime the mortgage was signed by Sylvia Henderson?

A. Yes, sir.

Q. Well, did he come back and get it?

A. Well, he must have, I don't recall just what——

Q. He never did get it, did he? You said they were both left in the office?

A. Well, they were left in the office.

Q. Well, there was no necessity for an escrow then. He hadn't been given an executed deed and take an absolute mortgage back so these papers were put by you for safekeeping in the bank?

(Testimony of Audrey Cutting.)

A. No, the deed and the mortgage and the note were altogether.

Q. Why didn't you go record them?

A. Why didn't I what?

Q. Record it?

A. Well, it was automatically at that time, most of the banks, all recorded the instruments as they came in and then deducted the amount from the bank account, but evidently they didn't do that. They only recorded on the front of the statement. It says Mortgage Not Recorded but nobody did anything about it and it wasn't called to my attention so I didn't know anything about it.

Q. Mrs. Cutting, you said this deed was delivered to Sylvia [27] in McCutcheon's office?

A. That deed was left in McCutcheon's office, yes.

Q. You said it was delivered to Sylvia in McCutcheon's office?

A. Well, from the first you have got this all twisted up, Mr. Grigsby, I said the deed was left in McCutcheon's office. The mortgage was left in McCutcheon's office; the note was left in McCutcheon's office and Mr. McCutcheon made arrangements with Mr. Thomas to leave the deed and the mortgage and the note in the Union Bank for collection.

Q. Then there was no delivery to Sylvia of the deed, is that right?

A. Well, it was signed. I don't know just what

(Testimony of Audrey Cutting.)

you mean by the word "delivery," Mr. Grigsby.

Q. Was it handed her or you for her?

A. Well, Mr. McCutcheon was my attorney and I took it for granted it was delivered to her for it was delivered to him for safekeeping.

Q. There was no escrow agreement whatever?

A. No.

Q. When were you to get this deed and have the privilege of recording it. The property was mortgaged back to him. Couldn't you have recorded it anytime you wanted to?

A. Yes, that is usually the form, the deed is usually recorded and the mortgage is recorded.

Q. But it wasn't done? [28]

A. Evidently not.

Q. And you didn't get that deed at all from the bank until you paid this note, did you—when you paid the balance of this note on July 1st, 1946, you got the deed out of the bank, didn't you?

A. Yes, sir.

Q. And then you didn't record it until August 4th?

A. No. You see I sent a check to the bank—I was busy at the time—for the full amount. I called them up and they told me what the full amount was.

Q. What was the full amount?

A. Four and some—seven hundred dollars.

Q. You didn't keep the payments up?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Where did you pay that?

A. To the Union Bank.

Q. All of it? A. Yes, sir.

Q. Now, isn't it a fact that there is a condition in this deed that you build a house within two years?

A. That was something that I didn't know either until after I got the deed.

Q. You didn't know that when you first saw the deed?

Mr. Butcher: Your Honor, I object to any questioning as to the conditions contained in the deed.

The Witness: No restrictions were mentioned.

Mr. Butcher: If there are any restrictions in the deed that is a matter between the grantor and the grantee and hasn't anything to do with this case.

The Court: Objection is overruled.

Q. (By Mr. Grigsby): Was there—was this the reason that these papers were put in the bank because they weren't to be delivered until you had complied with this provision in the deed to construct the building? A. No.

Q. It had nothing to do with it?

A. Not that I know. Building the building was never mentioned to me.

Q. What is that?

A. The restrictions were never mentioned to me.

Q. No restrictions were mentioned to you?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. And you gave a note and you saw the papers which was made out here on the 30th of November for which you gave a note afterwards and here you obligate yourself to pay and did pay three-hundred cash down and you didn't read the instrument?

A. I must have read it but probably not close enough.

Q. And you didn't know anything about that deed having a covenant in it that you had to finish a house within two years? [29]

A. If it did I had forgotten about it.

Q. In any event you did complete a house within two years? A. Yes.

Q. And the house was completed on July 1st when you paid the balance of the money, wasn't it?

A. Well, I wouldn't say just exactly that it was all completed because at that time we were having our discussions with Mr. Smith about the basement.

Q. But there was no more work done on it after that time, was it?

A. Yes, Mr. Smith went out there and did some dirt work around the place for me.

Q. After July 1st? A. Yes, sir.

Q. There were no carpenters working out there after July 1st?

A. I wouldn't say that.

Q. You know, don't you?

A. No, I don't.

Q. There might have been carpenters working, these carpenters here in the court room, they were working out there after July 1st?

(Testimony of Audrey Cutting.)

A. Mr. Smith could have called them back for work they didn't finish.

Q. Anyone else could have done that in your absence? Did you ever see any of these men after July 1st? [30]

A. I wasn't there 24 hours a day.

Q. Did you at any time when you were there see any of these men working after July 1st?

A. No.

Q. As a matter of fact you know that these men ceased working before July 1st? A. I don't.

Q. You don't?

Mr. Butcher: I think the witness testified that she doesn't know.

Q. (By Mr. Grigsby): Mrs. Cutting, you testified about leaving that form of a non-liability notice. I don't believe you said when it was you found it with reference to when you prepared your form from it. Do you know when it was you found it?

A. Of what are you speaking, Mr. Grigsby?

Q. The form of non-liability for liens notices which is in evidence here and which you said you found in a gutter.

The Court: Not the one in evidence.

Q. (By Mr. Grigsby): The notice you prepared is in evidence?

Mr. Butcher: Your Honor, I think Mr. Grigsby has misunderstood the examination of the defendant; she found a form from which she made——

Mr. Grigsby: That is exactly my question.

(Testimony of Audrey Cutting.)

The Court: It wasn't clear. The Court interposed.

Q. (By Mr. Grigsby): All right. When did you find the form from which you prepared this notice?

A. Mr. Grigsby, I would like to at this time retract the statement I made in the Court when I testified to the fact that I found a lien notice in the gutter. I am very sorry.

Q. Well, where did you get it?

A. I got the lien notice form from my real estate books that I have.

Q. Where? A. Real estate books.

Q. Forms in a real estate form book?

A. Yes, sir.

Q. And when did you get that?

A. Well, I have had those for some time.

Q. All right, when was it called to your attention first from which you prepared this notice?

A. When was it called to my attention?

Q. Yes.

A. What do you mean by that question, will you explain it?

Q. Well, the other day you said you prepared this notice from a form you found in the gutter and you saw it was suitable for the occasion so you at that time or subsequently prepared your [32] lien notice from it. Now will you just state how and when you prepared this notice from the form you found in your office and when this form in your office came to your attention?

(Testimony of Audrey Cutting.)

A. Well, I had typed it and kept it as the form on record.

Q. What is that?

A. I had typed it from the book and keep it on record in my office.

Q. For future use? A. Yes, sir.

Q. And do you know when you typed it from that book? A. I had my secretary type it.

Q. How long was it before you had occasion to make up the form from it—some considerable time?

A. Oh, yes, ever since I started in the real estate business I had lien notices.

The Court: Wait a minute, I didn't hear your last statement.

The Witness: I said ever since I began in the real estate business I had lien notice forms.

Q. (By Mr. Grigsby): And is that a printed form in a real estate book you have?

A. Yes, sir.

Q. And you own the book? A. Yes, sir.

Q. And you had your secretary make a copy of that? [33]

A. Yes, she copied a copy from the form, yes.

Q. Not this? A. Well, yes.

Q. This particular paper?

A. Yes, she typed that.

Q. Is that the only thing she got from that form? A. Yes, sir.

Q. And you knew about that form ever since you

(Testimony of Audrey Cutting.)

went in the real estate business? A. Yes, sir.

Q. When did you have her copy this?

A. Immediately after signing the contract.

Q. On November 30th—you mean your contract with Smith? A. Yes.

Q. That would be the same day that you posted it or the day before?

A. Well, we signed the contract on the 30th of April and I know I was very busy that day and I didn't have time to type it myself and at that time I had hired a secretary to work for me and she came to work the following day and I asked her the first job to do was to type that.

Q. Now on the 30th you got a contract with Smith under which he was to build a building for you? A. Yes, sir.

Q. And then you remembered on that occasion or immediately [34] after that you had seen a form in a form book of notice of non-liability, didn't you? A. Yes.

Q. So you immediately as soon as you could get it done—— A. Yes.

Q. ——had this notice made and the next day went out and posted it, is that right?

A. No, immediately after signing the contract; the lien notices were typed on May 1st, and I went out that evening and posted them on May 1st. It wasn't the next day; it was on May 1st.

Q. It was the next day after April 30th? The contract was signed on April 30th?

(Testimony of Audrey Cutting.)

A. I wasn't just clear on what you mean by the "first day"?

Q. And the first job you had done the next morning having contracted to build a building for your daughter, in your name of course the contract was, you had in mind the notice that you had run across when you first went in the real estate business, so you had your secretary the next day make out this notice and that night took it out there and posted it?

A. Yes, that was Mr. McCutcheon's instructions.

Q. So the contract you had posted to have a building built on wouldn't be liable?

A. Yes, that is correct.

Q. And so far it hasn't been liable, is that right?

Mr. Butcher: I don't believe the question makes sense. [35]

Mr. Grigsby: Withdraw the last question.

The Court: Question withdrawn.

Q. (By Mr. Grigsby): Now are you sorry that you retracted this statement about finding this in the gutter? A. Yes. sir.

Q. Now you were under oath the other day when you said you found this in the gutter. Now you say you didn't find it in the gutter?

A. That is correct.

Q. Why did you say you did find it in the gutter? A. And did I say that?

Q. Yes.

A. Well, Mr. Kay was the one who directed the questions at me and I had already given my prom-

(Testimony of Audrey Cutting.)

ise to the Bar Association that the real estate profession and the real estate dealers here in Anchorage—I was secretary of the Real Estate Board—and I was not to practice law without passing bar examinations. So I thought it was rather a leading question and caught me unawares.

Q. So you thought it would be better to perjure yourself rather than violate the law against practicing law, is that it?

A. It wasn't exactly perjury. I was ashamed.

Q. You were——. You swore under oath you went along the street and found this paper in the gutter and swore it under [36] oath and the reason you did that was because you knew or thought you didn't have a right to make up a form even for yourself because you would be practicing law?

A. Yes, sir, because I didn't know.

Q. It was fear of the prosecution of practicing law?

A. Yes, sir.

Q. And you found no paper in the gutter?

A. No, sir.

Q. No form?

A. No, sir.

Q. However, you did post the notices the next day—the notice, this one—on a tool box or in the basement, or one like this on a tool box?

A. Yes, sir.

Q. May 1st?

A. Yes, sir.

Q. And you are still sure of that?

A. Yes, sir.

Q. Did you know Thomas personally?

(Testimony of Audrey Cutting.)

A. No, sir.

Q. Did you ever see him around here during the time that you had possession of this property?

A. Repeat that again?

Q. Did you ever see him around Anchorage during the time you had possession of this property after November 30, 1946? [37]

A. I saw him once.

Q. What? A. Once.

Q. Just once, and that was on the occasion of this transaction? A. No, after that.

Q. When you paid him up?

A. No, it was before that.

Q. When was that?

A. Oh, I would say the year before. It was the summer before was my last conversation with him in 1947.

Q. You mean 1948 or 1947?

A. 1947. No, I didn't see him this last summer at all.

The Court: The Court will stand in recess until ten minutes past eleven.

(Short recess.)

The Court: Is there any other counsel who have not examined this witness who would care to?

Mr. Kay: I would like to ask a few questions, Your Honor, about this recent testimony.

The Court: Have you examined her before?

Mr. Kay: Yes. I cross-examined previous to this testimony this morning.

(Testimony of Audrey Cutting.)

The Court: I think the counsel should confine himself to the claims of the parties he represents because the general field has been covered by Mr. Grigsby. [38]

Q. (By Mr. Grigsby): Mrs. Cutting, have you got that book now with that form in it?

A. Yes, sir.

Q. And could you produce it? A. Yes, sir.

Q. Will you please do so this afternoon?

A. Yes, sir.

Q. Can you explain to me why it was necessary to put that deed in the custody of the bank? You have stated that the note was left there for collection purposes?

A. Why was the deed left in the bank?

Q. Yes.

A. Well, that I don't know.

Q. You don't know?

A. You would have to take that up with Mr. McCutcheon.

Mr. Grigsby: That is all.

The Court: Any other counsel care to examine who has not examined?

(No response.)

The Court: Any redirect?

Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, in connection with your answers to Mr. Grigsby's questions about this lien or

(Testimony of Audrey Cutting.)

notice of non-responsibility, [39] had you ever on previous occasions had occasion to use any of these forms? A. (No response.)

Q. Had you ever built a house before?

A. Yes, we were in the process of building and repairing a home out on Lennets Street.

Q. And had you personally ever used any of the forms before? A. Not to my recollection.

Q. Were you familiar with the use of the forms?

A. No, sir.

Q. Did you know that such forms were necessary? A. Yes, sir.

Q. How did you come to know that?

A. Because Mr. McCutcheon told me so.

Q. He advised you as counsel that they were necessary. A. Yes, sir.

Q. In this case? A. Yes, sir.

Q. But he didn't draw a form for you?

A. No, sir, he told me they were very simple and for me to draw them myself.

Q. Now did you have a conversation after you testified on the witness stand that you found this form in the gutter? Did you talk to me about the matter? A. Yes, I did. [40]

Q. And do you recall my asking you why you stated you found it in the gutter?

A. Yes, sir.

Q. And do you recall what you told me?

A. Yes, sir.

Q. And what was that?

(Testimony of Audrey Cutting.)

A. I told you that as the Secretary of the Board of Realtors of Anchorage that I had given my promise to Mr. Plummer that the real estate profession here, that none of the realtors were preparing any of their own legal documents or practicing law.

Q. And you were fearful that there was going to be an attempt made to have you answer a question which would incriminate you?

A. Yes, sir.

Mr. Kay: Your Honor, may we ask that Mr. Butcher cease to testify and quit answering questions.

Mr. Butcher: She has answered that it was for fear of prosecution.

The Court: Objection is sustained nevertheless.

Q. (By Mr. Butcher): And do you remember in our conversation what I told you?

A. Yes. You told me I had a perfect right to draw my own lien notices on the property because it was our own and I was acting as a guardian for Sylvia.

Q. And what did I tell you about what you should do about having previously testified? [41]

A. You asked me to retract the statement that I had last made in court and tell them that I had just—just exactly what I had done.

Q. Had you ever had the property surveyed out there? A. Yes, sir.

Q. Do you recall who surveyed it?

(Testimony of Audrey Cutting.)

A. Mr. Frank DeLaReyes.

Q. Is he a licensed surveyor?

A. Yes, I believe he is.

Q. And do you recall the date on which he surveyed the property?

A. It was on April 23rd.

Q. Of what year? A. 1948.

Q. Did he lay the entire lot out at that time?

A. Yes, sir.

Q. Did he at that time deliver to you a statement of the survey?

A. Yes, sir, I have a copy of it there in my file.

Q. You have a copy in your file?

A. Yes, sir.

Q. Where is your file, Mrs. Cutting?

A. Miss Sollee has it.

Q. Do you know that Mr. DeLaReyes signed this?

A. That is his usual signature, yes. [42]

Q. Did you see him sign it?

A. No, I didn't see him sign it.

Q. This was mailed to you?

A. Yes, his assistant usually brings them in the office and receives payment at that time.

Mr. Butcher: Now, your Honor, I can bring Mr. DeLaReyes here and have him certify that this was his signature but I believe that counsel might stipulate that it is.

Mr. Grigsby: What is the purpose of it?

Mr. Butcher: Your Honor, there has been a

(Testimony of Audrey Cutting.)

great deal of testimony, particularly on cross-examination, whether a certain pile of lumber which is material to the case, whether it was on one side of the line and this will establish the fact that a survey was made and that the line was marked on the 23rd day of April when one of the lien claimants claims to have started his work.

Mr. Grigsby: We have no objection. I still don't see the materiality of a survey.

Mr. Butcher: We offer this as an exhibit.

The Court: It may be admitted and marked Defendant's Exhibit No. 106. Certificate of survey 23 April 1948. Counsel may proceed.

Recross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, before you testified about that form, about which you made the notice of which is in evidence, you had shown Mr. Butcher that notice of lien that was in evidence, [43] hadn't you?

A. Yes, I had showed him a copy of the lien.

Q. You showed him that identical paper that is in evidence, didn't you? A. Yes.

Q. And told him that you had found it, too, didn't you? You told him you had found the form from which you drew it?

A. We didn't discuss that.

Q. Didn't he ask you where you had got the form? A. No, sir.

Q. He took and read it, did he?

(Testimony of Audrey Cutting.)

A. Yes, sir.

Q. And you told him that it was one of the notices that you had posted upon the premises?

A. Yes, sir.

Q. And he asked you who drew it?

A. No, sir.

Q. And you didn't tell him? A. No.

Q. Did you—he didn't ask you where you got it? A. No, sir.

Q. And you hadn't told him that you had got it in a gutter? A. No, sir.

Q. Now this property surveyed there, what is lot 2—an ordinary sized lot? [44]

A. Well, what do you mean by "ordinary sized lot"?

Q. Ordinary size residence lot 50 by 120?

A. No, 50 by 140.

Q. 50 by 140, I mean. That is the lot on which you put this building? A. Yes, sir.

Q. And that is the usual sized residence lot in the City of Anchorage? A. Yes, sir.

The Court: That is all, you may step down and another witness may be called.

(Witness excused.)

Mr. Butcher: Call Mrs. Sollee.

ICEL SOLLEE

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Butcher:

Q. Will you state your name to the Court?

A. Icel Sollee.

Q. You live in Anchorage, do you, Mrs. Sollee?

A. Yes.

Q. And you are employed as Secretary by Mrs.
Cutting? A. I was but I am not now.

Q. You were employed in her real estate office?

A. Yes, I was.

Q. When did you cease working for Mrs.
Cutting?

A. I don't recall the exact date. I believe it was
around the first of September.

Q. Do you recall when you went to work for
Mrs. Cutting? A. It was on May 1st.

Q. May 1st of what year? A. 1948.

Q. And had Mrs. Cutting made some arrange-
ments with you about coming to work for her?

A. Yes, I had talked to her some four days be-
fore but I hadn't planned on going to work until
Monday and she called me to work on Saturday
which would be May 1st, I believe. She called me.

Q. She called you to come down and you went
to work on Saturday? A. Yes.

Q. Where is that office?

A. It is located in the Pearl Building.

(Testimony of Icel Sollee.)

Q. That is the office where you went to work?

A. Yes.

Mr. Butcher: May I have the lien notice?

Mr. Robison: Here it is.

Q. (By Mr. Butcher): I hand you this paper marked "Lien Notice" and ask you whether you have ever seen it before? [46]

A. Yes, I have.

Q. Did you type that notice?

A. I didn't type this notice here but I typed, I think, four or five, I don't remember, off from this notice.

The Court: I didn't understand.

The Witness: I didn't type this notice here. Mrs. Cutting handed that one to me. But I did type four or five, I don't remember just which, off from this copy here.

Q. (By Mr. Butcher): You mean by that you made extra copies of that notice?

A. Yes, I did.

Q. And do you recall when you did that work?

A. It was on May 1st.

Q. It was on May 1st? A. Yes.

Q. How do you know it was on May 1st?

A. Well, that was the first day I had come to work and that was the first work I was given to do and I had never seen a lien notice before, so I remember it.

Q. And you have looked at it carefully and you know? A. Yes.

(Testimony of Icel Sollee.)

Q. When you type a notice and date it yourself do you usually put the date on which you do it?

A. Yes, I do unless Mrs. Cutting tells me otherwise.

Q. And in this case——? [47]

A. In this case I put the date on which I did it, May 1st.

Q. During the course of your work for Mrs. Cutting you have done all sorts of real estate work—you have drawn deeds and contracts and made copies of papers of different kinds—you have done general secretarial work in a real estate office, have you?

A. Yes.

Mr. Butcher: That is all.

Cross-Examination

By Mr. Grigsby:

Q. Mrs. Sollee you say you didn't write this particular paper?

A. No, I didn't.

Q. But this particular paper was handed you the first morning that you went to work?

A. Yes, it was.

Q. And was it signed at that time?

A. No, I don't believe so. I don't remember for sure whether it was or not.

Q. And do you remember what time of day you did this particular work on May 1st?

A. No, I don't. It was in the morning or afternoon.

Q. Was it the first job you did?

(Testimony of Icel Sollee.)

A. Well, I was typing up some personal letters along with it.

Q. And Mrs. Cutting handed you this identical paper and asked you to make some copies of it?

A. Yes.

Q. And had she prepared that in your presence that day? [48]

A. No, I didn't say that: I don't remember that.

Q. You don't know where she got it?

A. No.

The Court: What is the number of that?

Mr. Grigsby: This is Defendant's Exhibit No. 102.

Q. Did you use a form book in copying this?

A. I did not.

Q. You didn't see any form book? A. No.

Q. You just copied the notices you made from this paper? A. Yes.

Q. Do you know it is that particular paper?

A. Yes. I wouldn't be sure but I suppose it is. It is the only one I saw.

Q. Did you use the same typewriter on which this was drawn?

A. I don't know. I don't know where Mrs. Cutting done that work. That was handed to me and I didn't question her where she got it.

Q. How did you know you didn't write this one?

A. Well, I don't suppose I would be sure sure whether I did or not but she gave me this

(Testimony of Icel Sollee.)

notice here and then I typed the copies and they were posted right away, so I don't imagine——.

Q. She gave you a paper which could have been this or could have been another one like it?

A. Well, I imagine that was the only one. I wouldn't know. [49]

Q. There was only one but how do you know this was the only one she gave you?

A. After I typed them, too, she took them right away.

Q. And probably posted them as far as you know? A. Yes.

Q. And you made one and several carbons, I suppose? A. Yes.

Q. And the original was just like that?

A. Yes.

Q. How do you know that this isn't one of them that you made? Is there anything about it from which you would know? A. I wouldn't know.

Q. But anyhow she did hand you some papers either this or one just like it? A. Yes.

Q. From which you copied other notices?

A. Yes, sir.

Q. And she handed you that on May 1st already typed? A. Yes.

Q. Was it signed?

A. I don't believe it was. I wouldn't remember for sure.

Q. (By Mr. Kay): Mrs. Sollee, do you remember whether the paper which Mrs. Cutting gave you

(Testimony of Icel Sollee.)

to type, did it have any pen or ink corrections on it or was it typed out exactly like this naming Sylvia [50] Henderson, Audrey Cutting and Smith?

A. I don't know whether it was corrected in any way or not, that has been quite awhile ago.

Q. I was just trying to refresh your recollection as to whether it was this or the other one?

A. I wouldn't be sure.

Q. You said you always dated the paper the day on which the work was done unless Mrs. Cutting told you otherwise? A. Yes.

Q. Does Mrs. Cutting sometimes tell you to date papers on other dates than the time you did it?

A. Yes.

Q. What kind?

A. It might be personal letters.

Q. No, legal papers?

A. I can't remember any legal papers.

The Court: Does other counsel have any cross-examination?

Mr. McCarrey: None.

The Court: That is all.

(Witness excused.)

Mr. Butcher: The other witness I have sent for has not arrived. I didn't realize we would move so rapidly. I have two or three other witnesses coming whom I have told to come this afternoon but I believe that it is possible to get the other witness down here now. He will be right here, Your [51] Honor.

The Court: The Court will stand in recess until 11:40.

(Short recess.)

ALBERT FOX

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Butcher:

Q. State your name to the Court?

A. Albert Fox.

Q. You are commonly known as Al Fox?

A. Yes, Al Fox.

Q. And you are in the electric business here?

A. Yes.

Q. I believe you own the D & D is that correct?

A. That is right.

Q. Where do you live, Mr. Fox?

A. I live on 10 E. "F."

Q. And who do you rent that property from?

A. Eddie Jones.

Q. From whom? A. Eddie Jones.

Q. Whose property is it?

A. It is Jones' property.

Q. No, I mean the house where you live? [52]

A. Audrey Cutting.

You mean the old house?

Q. Yes. I moved.

Q. When did you live in this house?

A. Well, lived from July up until a couple of months ago.

(Testimony of Albert Fox.)

Q. You moved there what date in July?

A. Sometime in the middle of July.

Mr. Stringer: Which house is he talking about, Your Honor?

Q. (By Mr. Butcher): Where is this house located, Mr. Fox?

A. It is 15th and "H," the old house.

Q. It is a new house?

A. Supposed to be.

Q. And built so far as you know by Mrs. Cutting? A. Yes.

Q. And when you moved in you were the first occupant?

A. I think I was. Everything seemed to be new. There was still paint on the floor.

Q. Painting on the floor? A. Yes.

Q. And you believe that that was sometime around the middle of July? A. Yes.

Mr. Robison: I didn't hear the answer to that question. [53] Did you say there was paint on——?

The Witness: Paint, some still on the floor—dribbles.

Q. (By Mr. Butcher): When did you move from the premises?

A. A couple of months ago, I think. I can't remember the exact date.

Q. And you don't remember the exact date? That probably could have been in December then; was it before Christmas?

A. I am pretty sure it was.

Q. I am going to hand you a paper and ask you

(Testimony of Albert Fox.)

to read it and tell us whether you have ever seen it before and under what circumstances?

A. Well, I think I did see this paper, in fact, I think that was the one I picked up off the floor.

Mr. Stringer: I didn't hear the answer.

The Witness: I think that is the lien notice I picked up off the floor down in the basement.

Mr. Stringer: In the basement of this house you occupied as a tenant?

The Witness: Yes, sir.

Q. (By Mr. Butcher): And that is the house out there on "H" and 14th? A. Yes.

Q. And whereabouts in the basement did you find the notice, Mr. Fox?

A. There was a lot of stuff strung around there. The reason [54] I was so particular in saving, I had a lien notice on D & D that Harry and I knew that she was having trouble. The attorneys called me up and tell me about it and I just thought I would save it for her.

Q. Did you find any other papers?

A. There was a building permit on the floor and I picked that up.

Q. Do you recall any other papers?

A. No, I don't know of the rest of them, that is about all.

Q. After you picked them up where did you put them?

A. Put them in the dresser drawer upstairs.

Q. When did you deliver them to Mrs. Cutting?

(Testimony of Albert Fox.)

A. She came out.

Q. Did you deliver all the papers to her?

A. All that I had.

Q. That you had picked up? A. Yes.

Q. And this lien notice was one of the papers?

A. I think it was. It was a lien notice. I know it looks like it.

Q. Had you seen the contents of that before?

A. Yes.

Q. And does that look like that?

A. That is why I saved it. I had the same thing on the D & D.

Q. And you saw the signatures on it at that time? [55]

A. Yes, sir.

Q. And you saw the signatures on it at the time?

A. Yes, sir.

Q. And would you say it was the same?

A. It looks like it?

Q. As far as you know this was the lien notice you picked up? A. Yes.

Mr. Butcher: That is all.

The Court: Counsel for plaintiffs may examine.

Mr. Grigsby: I have no question.

Mr. Kay: Just one question.

Cross-Examination

By Mr. Kay:

Q. Mr. Fox, had you ever been out to the place before you moved in? A. Yes.

(Testimony of Albert Fox.)

Q. How long before?

A. A day or two, I think.

Q. The day before you moved in?

A. I couldn't say, I was out there but I didn't pay any particular attention to the house.

Q. Did you see any lien notices at that time.

A. No, I didn't.

Q. Had you ever been out there previous to that?

A. Well, I think we rode out there one time in order to take [56] a picture of the house and that was all there was to it. We came back to town.

Q. Did you notice any lien notices on that occasion?

(No response.)

Q. Just on this occasion when you moved in?

A. Yes.

Q. How long after you moved in was it before you picked that lien notice off the floor?

A. A couple or three days.

Q. Had Mrs. Cutting been in the house during that time? A. No.

The Court: How do you know that?

The Witness: The wife was there during that time and I think she would tell me if Audrey had been down.

Mr. Kay: That is all.

(Testimony of Albert Fox.)

Redirect Examination

By Mr. Butcher:

Q. Mr. Fox, do you recall the condition of the house insofar as the construction was concerned when you moved in?

A. Well, I would say we were going to have open house on Thanksgiving and we got froze out. I gave Alaska Plumbers a check for working on the furnace—Bill's Electric for working on the furnace, and I had a carpenter working down at D & D named Roberts and he came down and opened the only window we could get open. The front door wouldn't close. The wife had to put the mangle in front of that door. And we can go out and look [57] at that house and that masonite in that bathroom was absolutely scraps. We never had any hot water in the bathroom and the washbowls especially until I got Cliff Hohn's man out there to fix it.

Q. And what was the condition, do you recall, as to weather proofing?

A. Well, the basement—weather-proofing in the basement leaked.

Q. What was the nature of the leaks, were the leaks from pipes or outside?

A. Outside. I know there was plenty of water down there. I was busy trying to fix up the D & D at that time and I didn't pay too much attention to it. That house was in the worse shape of any new house I ever seen in my life. A man came down

(Testimony of Albert Fox.)

to the place of business. Finally after I got down feeling around, he was one of the men who was testifying, he was the man who fixed the masonry on the house, I told him what I thought of it.

Q. Who was that man?

A. I think it is that gentleman sitting over there, if I am not mistaken.

Q. Which one?

A. The gentleman right there.

Q. This gentleman right here? A. Yes.

Q. When was this he talked to you, Al? [58]

A. Saturday night.

Mr. Grisby: What Saturday night?

The Witness: This last Saturday night—night before last.

Q. (By Mr. Butcher): What was he talking to you about—the condition of the house?

Mr. Grigsby: Object to what conversation was had Saturday night.

The Court: If it was something the witness said in contribution to the testimony he made; otherwise not.

Mr. Butcher: Well, that is all.

Mr. Grigsby: No cross.

The Court: You may step down.

(Witness excused.)

Mr. Butcher: You Honor, may we suspend at this time. I have several other witnesses but I arranged for them to all come this afternoon and

they are all working people and I would have had to have brought them in from their work.

The Court: Do counsel wish to reassemble before two o'clock?

Mr. Grigsby: If Mr. Butchers' witnesses will be here before two.

Mr. Butcher: I arranged for them to be here at two.

The Court: There is not much point in trying to go along before two then. [59] Court stands adjourned until 2:00 p.m. this afternoon.

(Whereupon, at 12 Noon the Court recessed until 2:00 p.m. the same day. [60])

Afternoon Session

The Court: The witness may be called in behalf of the defendants.

Mr. Butcher: Call Mrs. Annabel—Mrs. Squyres.

MARY JANE SQUYRES

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. Will you state your name?

A. Mary Jane Squyres.

Q. Where are you employed, Mrs. Squyres?

A. I am employed at the Alaska Railroad.

Q. And Anchorage is your residence?

(Testimony of Mary Jane Squyres.)

A. That is right.

Q. And were you formerly employed as Secretary to Mr. Stanley McCutcheon?

A. Stanley and Nesbett.

Q. By the firm of McCutcheon and Nesbett as secretary? A. That is right.

Q. And during the course of your work it was your duty to type various legal documents?

A. Yes, sir.

Q. And to witness signatures occasionally?

A. Yes, sir. [61]

Q. I am going to hand you a copy of the warranty deed and ask you to examine it and determine if possible whether you prepared it and if you don't remember that if that is your signature that appears thereon as witness? A. The Signature is mine.

Mr. Stringer: Your Honor, I am not able to hear the witness.

The Court: Neither have I.

Q. (By Mr. Butcher): Did counsel hear the question?

The Court: She says the signature is mine.

Q. (By Mr. Butcher): The signature is yours?

A. Yes.

Q. And do you recall Mr. Thomas whose signature appears on there as grantor as signing it?

A. No, sir.

Q. You don't remember that; all you can identify is the signature? A. That is right.

Q. And you know if the signature is on there you witnesses the signing? A. Yes, sir.

(Testimony of Mary Jane Squyres.)

Mr. Butcher: That is all, your Honor.

The Court: Any cross-examination?

Mr. Grigsby: No cross. [62]

(Witness excused.)

Mr. Butcher: Call Mr. Seifert.

RAYMOND A. SEIFERT

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Butcher:

Q. Will you state your name to the Court?

A. Raymond A. Seifert.

Q. You are a major in the United States Army?

A. Yes, sir.

Q. You reside in Anchorage? A. Yes, sir.

Q. You have a home here? A. Yes, sir.

Q. Where is that home located?

A. The address is 1424 "H" Street, lot 3, block 37-D, South Addition to Anchorage.

Q. Is this the home that Russell Smith constructed for you? A. No, sir.

Q. Did he construct part of it for you?

A. He constructed a small 8 and 1/2 by 9 room, approximately that size, and it was pretty well built before.

Q. You simply had an addition put on?

A. That is right. [63]

(Testimony of Raymond A. Seifert.)

Q. And it was the addition Mr. Smith constructed, so you are well acquainted with Mr. Smith?

A. I wouldn't say well acquainted. I am acquainted with him through some work he did for me.

Q. Mr. Seifert, does your lot adjoin that lot on which Mrs. Cutting has had a home constructed?

A. Yes, sir.

Q. You know Mrs. Cutting?

A. I do since about 4 days ago—five days ago.

Q. You had never met her previously?

A. I had seen her previously.

Q. And you do recall when the construction commenced out on the property that Mr. Smith was working on adjoining yours?

A. I was absent at the time. I came back from emergency leave in the States. I came back on the last day of April and reached Fort Richardson about eleven o'clock at night and went to my home at the above address that I gave right after midnight. My family and I spent the night there.

Q. And do you recall about that time there being some lumber on the adjoining premises?

A. To the best of my recollection at that time they weren't doing anything but digging.

Q. Did they subsequently have some lumber piled out there? A. Subsequently they did.

The Court: What was the answer? [64]

The Witness: They did subsequently have lumber there.

Q. (By Mr. Butcher): Have you any idea from

(Testimony of Raymond A. Seifert.)

your own recollection as to when the lumber was put there?

A. Things are so vague; at that time I just completed a very strenuous trip up the Alcan Highway; that I can't recall just when the lumber came.

Q. But you do recall some lumber coming?

A. There was some lumber.

Q. And that lumber was used in the construction of a house? A. That is right.

Q. Do you recall more than one pile of lumber?

A. I think there were a number of piles of lumber of various sizes at different times.

Q. Now do you know of your own knowledge whether this lumber was on the property next door or on your property, if you know, tell the Court where you think it was?

A. To the best of my belief it was on the property next door. I purchased the place not long before.

Q. Were you acquainted with the property lines?

A. Fairly well, yes, sir. I was interest in it when I bought the property.

Q. Had there been a survey made recently?

A. They pointed out some stakes to me where they said was the property line. [65]

Q. And from your best recollection the lumber was on the other side? A. That is right.

Q. The side where they were doing the building?

A. Yes, sir.

Q. And not on your side? A. Yes, sir.

(Testimony of Raymond A. Seifert.)

Q. You say you arrived back on the 30th day of April? A. Yes, sir.

Q. And I believe your recollection didn't serve you sufficiently to remember whether or at least it was your recollection that the lumber came after that subsequent to that?

A. That is the way I recall it now but I won't swear there wasn't any there the next morning. I can't recall seeing any.

Q. And if I ask you any questions about it as to time you wouldn't remember, you couldn't identify time, you couldn't identify it as a week later that you saw lumber there, could you?

A. A week later? I would say it probably was because things moved very fast after they started.

Q. Do you remember seeing any large tool boxes setting out in your back yard?

A. The only tool box I remember was one I lent to them and that was a piano box.

Q. You lent to whom?

A. I lent to Mr. Smith.

Q. When and under what circumstances did you lend it to him? [66]

A. My furniture was delivered on May 6th by the Post. It was unpacked the same day I was home. I came home while the lumber—while the household goods were being delivered. We unpacked all of it that day and took it in the house. We didn't unpack all of it we unpacked some of it. It was sometime after that before we lent them the box. The piano wasn't uncrated that day.

(Testimony of Raymond A. Seifert.)

Q. It wasn't—— A. It was——

Q. ——uncrated that day? A. That is right.

Q. And it was subsequent to that day you lent it to Mr. Smith? A. That is right.

Q. What did he want it for, did he say?

A. I don't know how it came up. I may have had the idea myself or he may have had but there was a very strongly constructed box, well adapted for use as a tool box, and I either suggested that he use it if he wanted it or he asked me, I can't recall which it was.

Q. And then after you lent it to him what did he do with it?

A. It was moved over to the property next door.

Q. Moved over the property next door?

A. Yes, sir.

Mr. Butcher: That is all.

Cross-Examination

By Mr. Grigsby:

Q. You state, Major, that you arrived here the night of April 30, 1948? [67] A. Yes, sir.

Q. And you had been outside on an emergency trip? A. Yes, sir.

Q. You and your wife? A. Yes, sir.

Q. On account of the sickness of one of your relatives?

A. My wife's father passed away on April 5th.

Q. And you arrived out at Fort Richardson about eleven o'clock the night of April 30th?

(Testimony of Raymond A. Seifert.)

A. Yes, sir.

Q. And you registered in out there, didn't you?

A. Yes, sir.

Q. And you looked that up to see that that was the correct date?

A. Yes, sir, I checked it today.

Q. And that was the date you arrived out there and checked in?

A. I checked in on the 30th of April, 1948. I did not show the time as I should have done. I should have shown the hour at which I reported but I noted that I did not show it.

Q. And then you had lived in this place before that then, before you took this trip?

A. Right, sir.

Q. And you went from there to the house and occupied it the [68] rest of that night?

A. That is right, sir.

Q. And the next day?

(No response.)

Q. And at that time your household goods which you have spoken about were at the Fort, were they?

A. Yes, sir.

Q. Several days after that did the officials out at the Fort notify you that they didn't have room for those boxes?

A. Yes, sir.

Q. And on that account did you have them delivered to your place out here next to the Cutting residence?

A. They had 'phoned me several times at the

(Testimony of Raymond A. Seifert.)

office saying that I was just going to have to move my stuff because I needed the room and they did move it on May 6th.

Q. Were you there when it arrived?

A. I was not there when it arrived but my wife called and I went in right away.

Mr. Butcher: Your Honor, in Mr. Grigsby's questioning he continues to refer to this property as the "Cutting residence." There is no evidence that they ever resided there and made it their residence and I think it ought to be referred to in some way rather than the "Cutting residence."

Mr. Grigsby: The Cutting house, then.

Q. Now, then, were you there when those articles were receipted? A. Yes, sir. [69]

Q. And who receipted for them?

A. My wife, as I remember.

Q. Have you any way of knowing now that that was the 6th?

A. I checked with the—in Warehouse D at Fort Richardson they keep all the household goods and a number of people had been coming to see me at various times during the last week or so and questions have come up and I decided that I would go and check on these dates and I checked Friday and checked the record and that is how I know it was May 5th.

Q. Did you find the receipt that your wife signed? A. Yes, sir.

Q. And did you copy it?

(Testimony of Raymond A. Seifert.)

A. I copied it at that time and then I brought and I showed it to Mr. Bullerdick and today I went by and borrowed the file from the Post. I had the permission of the Executive Officer.

Q. Have you got the original receipt with you?

A. Yes, sir.

Q. May I see it. Do you know your wife's signature?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. Did you see her write it?

A. I cannot recall whether I saw her write it but we checked [70] the boxes together and I called numbers and she checked them.

Q. Now, calling your attention to—I want to point out an item here, box 1, 1210 under Weight, do you know which box that was—what that box contained?

A. That by far the largest box. I would say that was probably the piano box.

Q. And that piano was uncrated that day, was it?

A. Yes, sir.

Q. Now was it several days after that before it was loaned to Smith?

A. Yes, sir.

Q. Are you able to state approximately what date it was moved over onto the Cutting property?

A. I couldn't state positively except the day I talked to Smith I believe was on a Saturday because I wasn't home other times.

Q. Have you looked it up? It would be Thursday that arrived, wouldn't it?

A. Yes, sir.

(Testimony of Raymond A. Seifert.)

Q. Was it the very next Saturday he moved it or Saturday or two afterwards?

A. I can't answer that question for sure. I don't believe I knew Mr. Smith at that time. I believe it was sometime before I finally got acquainted with him.

Q. The next Saturday would be the 8th and the following [71] Saturday would be the 15th. What is your best recollection as to the date the box was loaned to Smith and moved? It was one of those two Saturdays, was it not? You are home on Saturday, are you not?

A. I was at that time, yes, sir.

Q. And you were home the day that the piano box was borrowed? A. Yes, sir.

Q. And you were home both on the 8th and the 15th?

A. To the best of my recollection I was. I can't guarantee it because we are awfully busy at the Post at the time.

Q. Well, at least it wasn't moved over there until the 8th?

A. I know it wasn't moved then and I don't believe I knew Mr. Smith at that time.

Q. And your best judgment it was the following Saturday?

A. Yes, sir, because the way I got acquainted with Mr. Smith was getting water at my place and finally my wife started to give the men coffee. She would send a pot of coffee and it was sometime later before we finally got acquainted.

(Testimony of Raymond A. Seifert.)

Q. Do you know what Smith and the carpenters used that box for?

A. Used it as a tool box and that was the purpose for which I loaned it to them.

Q. Now what is your best recollection, Major, as to when you first saw any lumber out there such as you have described?

A. Well, as I said, there may have been some when I first came [72] there but I don't recall seeing any. But I believe there was some the first part of the next week. Things moved very swiftly there when they started.

Mr. Grigsby: If the Court please, I would like to offer in evidence for the Court's inspection this receipt dated May 6th, and it being an Army record we would like permission have it withdrawn.

The Court: Is there any objection?

Mr. Butcher: No objection and no objection to it being withdrawn.

The Court: Very well, it may be admitted in evidence.

Q. (By Mr. Grigsby): Do you have a copy with you?

A. No, sir, I believe Mr. Bullerdick has it.

Q. Did you make a copy of that when you first went out and inspect it?

A. Yes, sir, I made a copy last Friday.

The Court: It will be marked Plaintiff's Exhibit PP. We will simply mark the copy and not the original.

(Testimony of Raymond A. Seifert.)

The Witness: There is another record in there that you may be interested in. It gives the time this shipment was shipped from Seattle and shipped from Whittier. This is a War Department Shipping Document here with my furniture reference.

Q. (By Mr. Grigsby): What is the date of it?

A. Dated March 16, 1948. [73]

Q. And is that the one you alluded to?

A. Yes, sir, it says Household Goods. It is so identified, also the number of packages and the weight and the cubic area.

Q. Does that correspond to the list that is in evidence?

A. I would say that it does. Box No. 1 shows that it is 1210 pounds. The bill of lading number is referred to in here. I also checked in case anybody is interested that this man, Lloyd, the checker, is now Sergeant Arthur R. Lloyd who is now stationed at Maddigan General Hospital in Tacoma.

Q. He is the man your wife receipted to at the hospital—at the house? A. Yes, sir.

Mr. Grigsby: That is all I have.

The Court: Mr. Butcher, do you want to examine?

Mr. Butcher: Yes, your Honor.

Redirect Examination

By Mr. Butcher:

Q. Major Seifert, you stated in answer to a couple of my questions, I asked you one with regard

(Testimony of Raymond A. Seifert.)

to time and you say you were very hazy as to time?

A. Yes, sir.

Q. But you did know that this furniture did not arrive until the 6th? A. Yes, sir. [74]

Q. And you knew that and you have now established it and in answer to my next question you said you didn't know when the box was taken over there but it was subsequent to that date?

A. Yes, sir.

Q. Now in answer to Mr. Grigsby's question you say it could have been the 8th or the following Saturday? A. Yes, sir.

Q. Do you actually know of your own knowledge when it was? A. No, sir.

Q. You do not?

A. I am not sure enough to say which Saturday it was.

Q. It could have been any day after it was uncrated?

A. Any day except that I feel I didn't—I don't feel like I knew Mr. Smith until sometime after I came back, to the best of my recollection and that is why I said it was probably a week from the Saturday afterwards.

Q. You came back on the 30th?

A. I came on the Post about eleven and when I got to Anchorage it was May 1st, very early in the morning.

Q. And by the 6th you could have made Mr. Smith's acquaintance could you not?

(Testimony of Raymond A. Seifert.)

A. I could have but I don't believe that I did.

Q. But you don't know when you did make it?

A. I don't believe that I did because I felt quite confident I wasn't home at all during the week except the day when the [75] furniture was unloaded.

Q. But if you said it was a week later or two weeks later it would be just a guess?

A. A guess, I might say, supported by other things which I feel linked to it.

Q. On the other hand you didn't make Smith's acquaintance until sometime after you returned home?

A. Yes, sir.

Q. You returned home on the 5th of May?

(No response.)

Q. Now your recollection about the lumber, you stated in answer to Mr. Grigsby's question, you state the lumber could have been there but it was your best recollection that it was delivered sometime later?

A. That is right, sir.

Q. Could that have been delivered after the 6th or around the 6th?

A. The lumber?

Q. Yes.

A. The lumber was there on May 6th because my wife remarked that some of the men had been sitting on the lumber watching them unload while the men were unloading.

Q. Some of the workmen?

A. That is right, sir.

Q. Now, you had occasion, I believe, I believe

(Testimony of Raymond A. Seifert.)

you said, to [76] engage Mr. Smith as a contractor to construct your own addition? A. Yes, sir.

Q. And you then engaged him as an independent contractor, did you, for a flat price?

A. It was not a flat price, I am sorry to say.

Q. What do you mean by that?

A. Well, time that I spoke to Mr. Smith about it, I asked him how much it would take to put a roof and a door—well, the door was in—well, the roof over a greenhouse which I had which was very well built adjoining my house. It was already connected by a doorway to the kitchen. And I asked him how much he wanted to erect the roof over it and floor it. He told me \$235 and I told him to go ahead. If it was in the neighborhood of that it was all right with me. A few days later he told me that he had miscalculated and it would be up around \$400 and some dollars. And, finally, when he completed the work which involved other work, they knocked the top out of a closet in my house and put a very rough stairway leading from the opening to the closet up to the attic and they put in two windows upstairs and they also erected a fence for me. I had the pickets already all cut and sawed and ready to nail up. They did that.

Q. What is the total price?

Mr. Grigsby: We object to that; it is immaterial for the Court, please.

The Court: Objection sustained.

Mr. Kay: I object to the whole course of this examination, it being improper.

(Testimony of Raymond A. Seifert.)

The Court: Counsel didn't object in time.

Mr. Kay: Any further——

Mr. Butcher: ——that the work was not satisfactory and the price was higher than that agreed upon and it is highly relevant if the contractor is engaged in similar practices and dealings with other people with whom he deals.

The Court: If that were true you could follow back Mr. Smith's course of business for the course of ten years and prove he never did do a good job in that event. The objection is sustained.

Mr. Butcher: May I have an exception.

Q. When the fence was built, Mr. Seifert, was it built along the line of property as you had formerly identified it? A. Yes, sir.

Q. Along the same line? A. Yes, sir.

Q. Between the stakes?

A. Yes, sir, I was quite concerned with it and checked it myself.

The Court: Any further cross-examination?

Recross-Examination

By Mr. Kay: [78]

Q. Major, I believe you testified that the piano box was probably box No 1 because of the weight of that box? A. Yes, sir.

Q. You are certain, are you not, that the piano box was included in those boxes?

A. I know it was.

(Testimony of Raymond A. Seifert.)

Q. And that it definitely arrived on your property on May 6th? A. That is right, sir.

Q. And prior to that time was in the warehouse at Fort Richardson? A. Yes, sir.

Q. Then it could not have been on your property on May 1st? A. That is right.

Q. Were you home on the evening of May 1st, do you recall, that was the evening after you drove in? A. Yes, I was home.

Q. Anytime during that evening did you observe Mrs. Cutting on the premises next door with a tack hammer in hand tacking up notices?

A. No, sir.

Q. Did you observe her at any time during that evening?

Mr. Butcher: Your Honor, I object to that line of testimony. The man has testified what he knows about it.

The Court: Objection is overruled. [79]

Q. (By Mr. Kay): You may continue, Major, did you see Mrs. Cutting at any time on the evening of May 1st? A. I cannot recall, sir.

Q. If you had seen her do you believe you would have recalled? A. No, sir.

Q. Major, did you ever have occasion to look over the Cutting house as it was being built?

A. Well, it was being built right next door and we are very close together. I have a picture of how close we are together here. I would say only about 10 feet apart.

(Testimony of Raymond A. Seifert.)

The Court: How far apart?

The Witness: 10 or 12 feet, sir.

The Court: Between your house and Mrs. Cuttings.

Q. (By Mr. Butcher): Who took the picture, Major?

A. I imagine I did. It was taken by my camera either myself or my wife took it.

Mr. Kay: I wonder if Mr. Butcher would object to admitting one of these pictures in evidence? Would you be willing to have it?

The Witness: If either one of them wants it I am glad to turn it over, if not, I will take it home.

Mr. Butcher: Will counsel state for what—what his purpose is in having it produced?

Mr. Kay: Just to show the Court the approximate—— [80]

Mr. Butcher: Objection: It hasn't been properly identified.

Mr. Kay: I won't make any point of it, your Honor, it would be impossible to properly lay a foundation. It would be difficult to lay a foundation because the Major does not know who took the picture.

The Court: You withdraw the offer?

Mr. Kay: Yes, I withdraw the offer.

The Court: Offer withdrawn.

Q. (By Mr. Kay): Major, during the time that you were living there that the Cutting house was under construction, did you at any time see Mrs. Cutting tacking up notices?

(Testimony of Raymond A. Seifert.)

Mr. Butcher: I object. It is repetitious, having already been answered.

The Court: Overruled.

A. No, sir.

Mr. Kay: Thank you, Major.

Mr. Butcher: What was the answer?

The Witness: No, sir.

The Court: Any other counsel care to examine?

(No response.)

The Court: That is all, Major, you may step down and if you wait a few minutes we will give you back your book.

(Witness excused.)

The Court: Another witness may be called. [81]

Mr. Butcher: I would like to request the Court to recall Mrs. Cutting.

The Court: Very well, Mrs. Cutting may be recalled.

AUDREY CUTTING

called as a witness herein, being previously duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, you have heard the Major testify in connection with the so-called piano box which was apparently sometime located on your property, do you have any further information in

(Testimony of Audrey Cutting.)

connection with the posting of these notices and the various lumber piles and the box which you could tell the Court about?

A. Well, no, I don't have any further information. The only thing that I will say, that everyone has hopped onto this piano box as being the one where the tools were stored, when that place was first built there was a box and I described it in Court and everyone has leaped on it because it was supposed to be in the size and the shape of a piano box, and I told them it wasn't the big piano box I had put the notice on but it was half the size of the desk Mrs. Annabel has and it come up to me about here.

Q. That is about to your chest?

A. Major Heifert's piano is an upright piano and it is almost as tall as I am if I take my shoes off.

Q. How do you know that?

A. I was in Mr. Seifert's room the other day and I had occasion to look at it very closely. Now that box they first had on there was not a large piano box. I am a musician and this was not a large piano box.

Q. I believe in answer to Mr. Davis' question a couple of days ago you said it was like a piano box?

A. That is correct, it was in that shape because I couldn't draw, I don't draw.

Q. Have you at any time said it was a piano box?

A. No.

(Testimony of Audrey Cutting.)

Q. And to you it was what?

A. It was just a box, a tool box with a slanting cover on it.

Q. And it was that box in which you posted the notice?

A. Yes, sir. And that was on my property because I made reference to it now when talking to the surveyor of the property to follow the line between Major Seifert's house and my house and that tool box and the lumber piles were on my side and they weren't large lumber piles, they were small lumber piles.

Q. I believe in answer also to certain questions about that box that Mr. Davis asked you several days ago, you have positively stated that it was on the first day of May and then when I asked you about it again you were not as confident——[83]

Mr. Kay: I object to the form of that question, your Honor.

The Court: Counsel is virtually testifying or making an argument not asking a question.

Mr. Butcher: I am refreshing the witness——

The Court: You can put it in the form of questions.

Q. (By Mr. Butcher): Tell us about the certainty of the posting of the notices in your own words without any questions at all. Just tell us what happened in connection with the posting of the notices?

A. On May 1st, that was the first day that my

(Testimony of Audrey Cutting.)

secretary went to work, and I instructed her to type up the lien notices. There were four notices, and I posted three that evening on the property.

Q. You are sure?

A. That is to the best of my recollection.

Q. Can you say or go back and say anything at all that would identify it at May 1st other than your recollection?

A. No, sir.

Q. How long ago is that? Is that about nine months ago?

Mr. Grigsby: We object to any argument.

The Court: Objection sustained; the Court can figure out how many months ago it was.

Q. (By Mr. Butcher): I believe you previously answered this, you said when the cement floor was poured and the first floor put on the building [84] that you posted the last notice?

A. Yes, sir.

Q. Did anyone at any time ever in connection with this case ever discuss those notices with you?

A. No one but Mr. McCutcheon.

Q. Well, he isn't party to this. That is all.

The Court: Any further cross-examination?

Further Cross-Examination

By Mr. Grigsby:

Q. What discussion did Mr. McCutcheon have with you about it?

A. He asked me to post the lien notices as fast as possible.

(Testimony of Audrey Cutting.)

Q. And that is why you did it after signing the contract?

A. That is right. And the following Monday Mr. McCutcheon questioned these and I saw him on the street and he asked me "Did you post those notices?" and I said "Yes."

Q. What day was April 30th—Friday?

A. Friday.

Q. And you posted them Saturday?

A. Yes, sir.

Q. And you told him when you had posted them?

A. Yes, sir.

Q. And you posted the first one on a tool box?

A. I wouldn't say the first one.

Q. But you did say that the other day? [85]

A. No, I said I had three notices and I posted two on two lumber piles and one on the tool chest, as to which one was first I don't remember.

Q. But all the same evening? A. Yes.

Q. And you would go out there and find that they had been falling off and you re-posted them?

A. Yes, sir.

Q. And you posted it on this tool box?

A. Yes, sir.

Q. And you know you posted it on the tool box the first time on the night of May 1st in the evening?

A. Yes, sir.

Q. And you went out in the evening because you didn't want to disturb the carpenters at work?

A. Not only that but because it was the only time I had free.

(Testimony of Audrey Cutting.)

Q. But you did say the other day you went out there in the evening because you didn't want to disturb the carpenters at work? A. That is right.

Q. (By Mr. Kay): Mrs. Cutting, the other day you said these lumber—today you say these were not large but small lumber piles?

A. That was the other day. I didn't give any impression that they were large lumber piles. [86]

Q. In response to questioning by Mr. Davis you are sure you didn't describe the type of lumber that was in those piles? A. No, I didn't.

Q. As a matter of fact didn't you say they were composed of two by fours and ship-lathe?

A. I don't believe——

If the reporter shows it is, are you mistaken now or are you mistaken then?

A. I don't recall any shiplathe being there.

Q. You deny that you said the other day that one lumber pile was composed of shiplathe?

A. I think you are referring to testimony that we were speaking of further along when the larger lumber piles were there.

Q. How big were these lumber piles?

A. They weren't very big.

Q. How big were they—knee high?

Mr. Butcher: Your Honor, I object to this testimony. Mr. Kay has interrogated this witness?

The Court: Counsel opened the thing up by further interrogation. After counsel for the defendant has asked questions it is not in order to forbid

(Testimony of Audrey Cutting.)

the counsel for plaintiffs to cross-examine on the very subject testified to by the witness upon direct examination of counsel. The objection is overruled.

Mr. Butcher: Then I further object, your Honor, on the [87] grounds that I was not given an opportunity in between the questions of Mr. Grigsby and Mr. Kay and I think the rule was the other day——

The Court: All right, go ahead and examine the witness. Mr. Kay will be seated.

Mr. Butcher: It is too late in these proceedings. I will withdraw it.

The Court: Go ahead, Mr. Kay.

Q. (By Mr. Kay): Well, how big were these lumber piles—knee high?

A. I don't remember that, Mr. Kay.

Q. You can't remember that?

A. I know they weren't big lumber piles.

Q. What is your idea of a big lumber pile?

A. Big lumber pile is a pile—well, it is a big lumber pile, period.

Q. You can't give the Court any idea whatever about how big you consider a big lumber pile?

A. Just depends on the job.

Q. You mean that your idea of a big lumber pile depends on the job?

Mr. Butcher: Your Honor, I object to any further questions. She is not a materials man, a lumber man. What is big in her mind might not be a big pile in a lumberman's.

The Court: She used the word "big." [88]

(Testimony of Audrey Cutting.)

The Court: Overruled. What do you mean by "big"?

The Witness: Just piles and piles of big lumber piles.

Q. (By Mr. Kay): How big is a little lumber pile, a small lumber pile?

A. Well, it wasn't a very big pile. It was there on the side.

Q. Two? A. Two, yes.

Q. Were they ankle high would you say—about that high?

A. In between your ankle and knee, yes.

Q. Yes, sir, somewhere between the ankle and a knee of a middle-tall man, you said, mine?

A. No, I said mine.

The Court: Any further direct examination?

Mr. Butcher: No, your Honor.

Q. (By Mr. McCarrey): Mrs. Cutting, I believe you testified that you placed this notice upon one of the lumber piles or upon the boxes, is that correct, or a notice similar to that?

A. Notice similar to that.

Q. Now, coming back to the size of this lumber pile, I would like to inquire whether or not the lumber pile was sufficient to have this stand up or was it laying partially on the ground?

A. It was laying on top of it.

Q. You laid it on top of it?

A. Yes, laying on top. [89]

Mr. McCarrey: That is all.

(Testimony of Audrey Cutting.)

Mr. Kay: In view of that question——

Mr. Butcher: I object to that.

The Court: Go ahead.

Q. (By Mr. Kay): Mrs. Cutting, I asked you specifically where you tacked that onto the lumber pile and you said “The end of the lumber.”

A. I wouldn’t be sure what I testified to.

Q. And I don’t believe you do either.

Mr. Butcher: Your Honor——

The Court: The comment of counsel is out of order. It will be stricken.

Mr. Kay: Sorry, your Honor.

Q. (By Mr. Grigsby): Did you bring that real estate book with you? A. Yes, sir.

Q. Do you have it with you now?

A. Yes, sir.

Q. Will you produce it? Will you turn to the form you alluded to? And this is the form that you had been familiar with since you went into the real estate business? A. Yes, that is one of them.

Q. This is the one you alluded to in your testimony? A. Yes.

Q. That you had been familiar with and Mr. McCutcheon had [90] advised you to get out there immediately and get this notice posted so you drew it up in this form?

A. Approximately, with some changes.

Mr. Grigsby: We offer the form in evidence.

The Court: Is there any objection?

Mr. Butcher: No objection.

(Testimony of Audrey Cutting.)

Mr. Grigsby: It will be noted, if the counsel will agree, to be form No. 2504 entitled Notice that Owner will not be Responsible for Improvements of Cowdery's Legal Form No. 918.

The Court: What is the number of the form?

Mr. Grigsby: 2504, Cowdery's Legal Forms.

The Court: I am informed by the Clerk that the certified copy of Plaintiff's Exhibit PP has been made and certified to. Therefore the original may be returned to Major Seifert. I assume that the counsel will have no objection to the substitution of a certified copy of marked Plaintiff's Exhibit QQ?

Mr. McCarrey: No objection, your Honor.

Mr. Grigsby: That is all.

Further Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, this Form 2504, have you looked at this carefully? A. Yes, sir.

Q. And did you copy this form from the book or in what manner did you use this form to prepare the exhibit which you have [91] testified to posting on the property?

A. Well, I used part of it and part that would apply to the property.

Q. Was this form a satisfactory form for your purposes?

A. I didn't think it was, no. It wasn't quite clear enough to suit me.

Q. And you simply used this as a guide?

(Testimony of Audrey Cutting.)

A. That is right.

Q. And you made no attempt to copy it word for word? A. No, sir.

Q. And the form that was drawn was drawn by yourself using this form as a guide?

A. That is right.

Mr. Butcher: That is all.

The Court: That is all.

(Witness excused.)

Mr. Butcher: Defendant rests at this time.

The Court: The Court will stand in recess until fifteen minutes past three.

(10 minute recess.)

Mr. Butcher: Your Honor, I had rested my case. However, I would like to make a motion to permit the defendant to file an amended answer.

Mr. Grigsby: If your Honor pleases, that is rather indefinite.

The Court: I cannot rule upon the motion until I know what the proposed amended answer would embrace. That is not contained in the answer now on file?

Mr. Butcher: There is nothing additional contained, your Honor. The previous answer was filed and signed by myself in the absence of Mrs. Cutting who was outside and at the beginning of this trial I discovered one error in it and I corrected that by serving upon Mr. Grigsby a copy of the second answer in connection with his filing only.

In view of the development of the trial I have prepared a second amended answer which denies and admits everything which was denied and previously admitted by the previous answer and sets up affirmative defense the same grounds as previously set up and instead of showing that Sylvia Henderson was a minor, with the word "minor" only indicating her status, I set up a separate paragraph which identified her as a minor under 17 years of age and also that she caused to be posted notices upon the property, and that is the only change.

The Court: Counsel will send the proposed answer to the bench and give counsel for the other parties a copy so that they may see it, and we will be in better position to determine what is to be done.

Mr. Butcher: Your Honor, in the event argument is necessary, I am prepared to make argument on it. But I am submitting it now in connection with your Honor's request. I have copies for all counsel. [93]

The Court: Is there objection?

Mr. Grigsby: I have none.

The Court: Without objection the proposed amended answer of the defendants Audrey Cutting and Sylvia Henderson may be filed.

Mr. McCarrey: Your Honor, I would like to inquire of the Court—

The Court: Has counsel any objection?

Mr. McCarry: No, I have not, your Honor.

The Court: Very well, counsel may proceed.

Mr. McCarry: I would like to have the chance

to answer the affirmative defense set up in this.

The Court: All of the parties may reply to the affirmative defenses.

Mr. Grigsby: May it be deemed denied?

The Court: And if there is no objection all the affirmative defenses may be deemed denied. Have counsel for the defendants any objection?

Mr. Butcher: No, I am quite satisfied with that, your Honor. But I don't know, counsel aren't here who know nothing about this and who can't be spoken for.

Mr. Grigsby: That can be taken care of when they arrive, I suppose, your Honor?

The Court: When they arrive we can find out.

Mr. Grigsby: Mr. Bradley. [94]

Mr. Butcher: Your Honor, may I ask one further question about this denial? That denial goes to every part of the defense, is that correct?

Mr. Grigsby: We admit that Sylvia Henderson is a minor.

The Court: I think it would be better to file written replies. Counsel may have 48 hours. The other parties may have 48 hours within which to file written replies to this amended answer.

K. D. BRADLEY

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please.

A. K. D. Bradley.

Q. Where do you live, Mr. Bradley?

A. At the present time I am living at 423 Ninth Avenue.

Q. And where did you live last May and June?

A. Same place.

Q. Do you know Russell Smith? A. I do.

Q. And where was he living at that time?

A. With me.

Q. And did you have occasion to observe the construction of the residence building on the premises in controversy here? [95] A. I did.

Q. Being what is known as the house built by Audrey Cutting?

Mr. Butcher: He should wait to answer until the full question is stated. I don't know whether the answer makes sense if he answers in the middle of it.

Q. (By Mr. Grigsby): I am referring to lot 2 in block 37 D, South Addition?

A. I don't know the place by lot and block number excepting seeing some of the papers that were served, but I suppose it was the same place. It was the one he built for Audrey Cutting.

(Testimony of K. D. Bradley.)

Q. The Smith Building, and did you observe that construction from the beginning? A. I did.

Q. And did you have a special interest in that construction? A. I did.

Q. Now did you make notes of any of the dates that various things occurred out there in the course of that construction? A. Yes, I did.

Q. Now did you make notes of any of the dates that various things occurred out there in the course of that construction? A. Yes, I did.

Q. Have you that with you?

A. I have some of the notes that I had taken at that time.

Q. Now did you make a note of when that construction started? A. Yes, sir.

Q. Refreshing your memory from your book there, can you state when that construction started referring to the excavation?

A. The excavation started April 26th according to my notes then. [96]

Q. Did you make the entry on the day it started?

A. Yes, sir.

Q. And have you an entry there of the date the first lumber arrived there?

A. First load of lumber, May 3rd.

Q. Were you in the vicinity when it arrived? Did you see it arrive? A. Yes.

Q. And made the note on that day? A. Yes.

Q. Now when was the first carpenter work done there?

(Testimony of K. D. Bradley.)

A. I couldn't say for sure without getting some other records but the forms for the concrete was built between the third and the fifth. How I know that is the concrete was poured on May the fifth for the floor of the building.

Q. Now at that time was there any post or pillar erected in the basement?

A. No, there would be no post or pillars in the basement because the concrete floor hadn't been poured yet.

Q. When they did put the post or pillar in the basement they had to rest on the concrete?

A. Right.

Q. Do you know what rate those posts were erected?

A. I couldn't say that. I can tell you when the first blocks of the log were laid.

Q. When was that? A. On May 6th.

Q. At that time were the posts or pillars placed in position? A. No.

Q. The floor hadn't been completed yet?

A. No, the building hadn't been. The walls of the basement hadn't been completed yet.

Q. Now do you know of Mr. Seifert who lives next door to these premises?

A. I can't well say I am well acquainted with him. I know the man when I see him.

Q. You know his place? A. Yes.

Q. Do you know anything about a box big enough to contain a piano which was used as a tool box during the course of this construction?

(Testimony of K. D. Bradley.)

A. I know of a box that was used as a tool box that was secured from Mr. Seifert.

Q. And do you know when that was secured from Mr. Seifert from your notes?

A. Not on my notes.

Q. Do you have any other way of knowing it?

A. Well, I know it was after May the 6th.

Q. And how do you know it was after May 6th?

A. The van that carried Major Seifert's material bringing it out to his place stopped in the way of unloading some blocks and we asked them to move and they pulled around into the alley and backed in and unloaded furniture boxes from his place on May 6th.

Q. Then you have an item in your book to that effect?

A. That that was the day that they started laying the blocks and that is when we got the second loads of blocks which the van was in the way of unloading.

Q. And you have the date of the second load of blocks? Do you know how long after that that piano box was brought over and used as a tool box?

A. I couldn't say, a number of days.

Q. That is as close as you state? Were you over on the premises and watched the construction frequently?

A. I was there from the first of the excavation until the final windup of the painting and the finish of the job.

(Testimony of K. D. Bradley.)

Q. Did you ever see any notices posted there to the effect that Audrey Cutting or Sylvia Henderson or anybody else wouldn't be responsible for any lien claims?

Mr. Butcher: Your Honor, I object to the question as leading.

The Court: Objection overruled.

(Question read.)

A. I don't remember seeing any such notices.

Q. (By Mr. Grigsby): If you had would you remember it? A. I believe I would.

Q. Did you ever see any such notice on that tool box? A. I don't believe I ever did.

Q. Don't you know?

A. I believe I would have noticed it if it had been there because I have been in the construction game a long time.

Q. You haven't any recollection of any such notice being seen at any time? A. No.

Q. And you were out there every day during construction?

A. I don't believe I missed a day.

Mr. Grigby: That is all.

The Court: Counsel for defendant. Do you prefer to have counsel for the intervenor question first?

Mr. Butcher: I will talk to Mr. Stringer just a moment. I will yield to Mr. Stringer at this time.

Q. (By Mr. Stringer): Mr. Bradley, are you

(Testimony of K. D. Bradley.)

familiar with the terms of the contract—the independent contractors agreement between Smith and Mrs. Cutting that has been identified here as trustee in intervention No. 1?

A. I read them over sometime about the middle of May, I believe, wait a minute, yes, the middle of May. [100]

Q. You read the contract over? A. Yes.

Q. You testified in response to Mr. Grigsby's question you were there all during the course of the construction up until the house was finished, up until the day?

A. I don't believe I missed a day.

Q. Was the house completed when it was turned over to Mrs. Cutting?

A. I believe that the only thing that was done after it was turned over to Mrs. Cutting, we got a pretty heavy rain and some of the backfill along the outside wall had sunken from the cause of that rain and I believe Mr. Smith went back after—Mr. Smith and myself went back after the keys were turned over and filled in where that ground had shrunk away.

Q. Were the doors and the windows and closets and the cabinet work done in accordance with the terms of the contract?

Mr. Butcher: I object to this question, Your Honor, the witness has testified while he read the contract he simply remembered it. He is not there as an inspector and he can only say whether he

(Testimony of K. D. Bradley.)

thinks the building was finished or not and not in accordance with all the terms of the contract. The question is leading, besides that.

The Court: The objections are overruled.

A. I wouldn't say positively that is in the contract as to what number of doors, windows, cabinet work and so on and so [101] forth is in that contract or what it is.

Q. (By Mr. Stringer): Were the doors and windows installed and the closets installed and the cabinet work finished? Was all that done in accordance with good building practice?

Mr. Butcher: I object to that, Your Honor, this man is not a building inspector and is not qualified as such; at least he has not so testified to such.

Mr. Stringer: I will qualify him, your Honor.

Q. How long have you been in the building trade?

A. I got my first journeyman card as an electrician in 1907.

Q. Have you followed the building and construction trade continuously?

A. I would say I followed it better than fifty per cent of the time since that date.

Q. Then you know a construction job when you see one? A. I believe I do.

Q. Was this work done in accordance with good building practice? A. I believe it was.

The Court: Is there an objection?

Mr. Butcher: There was objection.

(Testimony of K. D. Bradley.)

The Court: The witness has not shown himself qualified except as an electrician. I have yet to hear any testimony that he is especially familiar with carpenter work or construction work except as it involves electrical installation and [102] therefor the objection is sustained.

Q. (By Mr. Kay): Mr. Bradley, I believe you testified that the first lumber arrived on May 3rd—first load of lumber—May 3rd? Now, to the best of your knowledge was there any other lumber piled on that lot prior to May 3rd?

A. Not to my knowledge.

Q. You were out there every day during that time?

A. I was there, I believe, every day from the time Bert Angee moved his shovel over there.

Q. And you don't remember any lumber piled up there over there? A. I don't.

Q. Do you know what the men used to keep their tools in prior to the time they borrowed the box from Major Seifert? A. Yes, I do.

Q. Would you describe it, please?

A. I had a plywood box made for my little Ford pickup. Its dimensions were 36 inches long, 24 inches wide, and 18 inches deep.

Q. That is 18 inches high?

A. That is right. And it was painted green.

Q. And is that the box that the men used to keep their tools?

A. That box was used for the electrical cords,

(Testimony of K. D. Bradley.)

extension cords, [103] and the saws and stuff that is owned by Mr. Smith.

Q. Other than that box and the box which they later borrowed from Mr. Seifert, do you know of any other box that was used as a tool box on this job?

A. Only the men's personal tool boxes.

Q. What size would those be?

A. I would say they would probably be 36 inches long and maybe 10 inches wide, 8 or 9 inches deep.

Q. This box—this green plywood box that they borrowed from you that they kept their tools in until they borrowed the box from Major Seifert was no more than 18 inches high?

A. That is right.

Q. By its biggest dimensions how large was that?

A. 36 inches long.

The Court: Any other counsel——?

Q. (By Mr. McCarrey): Mr. Bradley, I would like to inquire as to what kind of lumber was delivered on the 3rd as to which you referred?

A. Dimensions of shiplathe.

Q. Was that in one or more piles?

A. The first load was dumped in one pile.

Q. Do you recall how big a pile that was by dimension?

A. Well, it was the width of a lumber truck and I would say approximately two and one-half or three-feet high.

The Court: Counsel for defendant may examine [104]

(Testimony of K. D. Bradley.)

Cross-Examination

By Mr. Butcher:

Q. Now Mr. Bradley, I believe you testified you had this book in your possession during the entire construction of the Cutting House?

A. Yes.

Q. And is it your practice to carry a book like this around on these jobs?

A. That question again?

Q. Is it your practice to carry a little book in which to make notes around on these jobs?

A. I generally carry a note book in my pocket at all times.

Q. I believe you run a grocery store, do you not, Mr. Bradley? A. Sir?

Q. Do you run a grocery store?

A. Not now.

Q. You were in the grocery business?

A. Up until February 12th.

Q. February 12th?

A. 1947, I believe it was.

Q. 1947? You haven't been in the grocery business since then? A. No.

Q. What business have you been in?

A. When I came back to Alaska, back to Anchorage a year ago, a year ago this spring I took out a real estate dealer's license. [105]

Q. You have been engaged in buying and selling real estate since that time?

(Testimony of K. D. Bradley.)

A. I have sold some.

Q. I believe you testified you had an interest in this construction on the so-called Cutting property, what was that interest?

A. I was on a deal—a real estate deal—at that time to construct five houses similar to those plans that that house was built on for some Army officers and I was keeping a very close touch with the building to find out the number of days, hours and cost of material that went into that building. And the contractors of the City here, most of them, said it would take from 45 to 60 days to construct the building, and Mr. Smith said he construct it under 45 days and gave an estimate of 35 days.

Q. Mr. Smith is your son-in-law or was your son-in-law, is that correct? A. Right.

Q. And you have known Mr. Smith for quite some time? A. Yes.

Q. Did you have a financial interest in this contract? A. I do not.

Q. Were you a bondsman on the property?

A. I was.

Q. Who was bondsman with you? [106]

A. I believe Audrey Cutting was the other bondsman at that time.

Q. Where do you maintain your real estate office? A. In my house.

Q. And your house is located where?

A. 423 Ninth Avenue.

Q. 423 Ninth Avenue—is that near this property that was under construction?

(Testimony of K. D. Bradley.)

A. 12 or 14 blocks.

Q. Do you have a car? A. I do.

Q. You had a car last summer?

(No response.)

Q. And you need a car in your business?

A. Yes.

Q. What time do you usually open your office in the mornings?

A. Well, during the time of that construction I generally went over there to the building the first thing in the morning.

Q. The first thing in the morning, what time would that be—when the carpenters arrive?

A. Between 8 and 8:30.

Q. How long would you stay there?

A. Some days I stayed there until noon.

Q. You stayed there until noon just watching?

A. Just watching. [107]

Q. You weren't working yourself?

A. I did help move some lumber and some concrete blocks.

Q. Were you paid for that? You didn't file a lien for that?

A. At that time I was convalescing from a very serious operation and I was doing it to get my health back and strength.

Q. Were you there in the afternoon?

A. Most of the days I was there part of the afternoon.

Q. So that most of the days you were there in

(Testimony of K. D. Bradley.)

the morning until noon and most of the days you were there all afternoon?

A. I wouldn't say all afternoon—sometime during the afternoon.

Q. Were you there the day the men were sitting on the lumber pile watching the unloading of his furniture?

A. I don't ever remember of anything like that happening.

Q. You were there, I believe you testified, when the furniture was unloaded next door?

A. The crating boxes, I wouldn't say when they unpacked the furniture but I would say when the crating arrived.

Q. That is how you knew about this piano box?

A. That is right.

Q. And were you watching the unloading—the unpacking?

A. Maybe everybody might have stopped for five minutes to watch that big trailer backed into there because it was a very artistic job. [108]

Q. Now you testified that the lumber came about three times—one load or two loads about the third day of May—your book——

A. First load of lumber May 3rd.

Q. And what was your purpose in making that notation?

A. The time element used in construction of the building.

Q. And when did the second load arrive?

(Testimony of K. D. Bradley.)

A. I don't believe I have the second marked down here.

Q. Were you aware at that time that notices of non-responsibility should have been posted on that property?

Mr. Briggsby: Object to as assuming something not in evidence.

The Court: Objection sustained.

Q. (By Mr. Butcher): You are familiar with notices of non-responsibility, are you?

A. I am.

Q. You have posted them yourself on other jobs?

A. I believe I have posted those notices once.

Q. Do you recall the job?

A. I believe it was the time that I built my house down at 10th and E—G Streets.

Q. Who built that house?

Mr. Kay: I object, Your Honor, as being immaterial.

The Court: Does counsel wish to be heard on that?

Mr. Butcher: If it is necessary, Your Honor. This man [109] has testified that he did not see notices of non-responsibility. In order to determine whether he had ever seen one or not he would have to know what one looked like and I am inquiring if he knows what a notice of non-responsibility looks like so that he could identify it if he saw it.

(Testimony of K. D. Bradley.)

The Court: Objection is overruled. You may answer.

Q. (By Mr. Butcher): Who built that house?

A. I built it up to the finish work.

Q. You built it and you posted notices of non-responsibility for your own construction, did you?

A. On the finish work. The bank held the mortgage on the property and I posted those notices to hold.

Q. You posted the notices for the bank, then?

A. Sir?

Q. You posted the notices for the bank?

A. I posted the notices for the protection of the bank.

Q. That is the only time you were called to ever post them then? A. I believe that is right.

Q. Have you ever had occasion to examine one then on any other property?

A. I don't believe I have.

Q. Have you seen any signs on this property called Notices of Lien?

A. I don't believe I was down to the property again after it [110] was finished.

Q. Before it was finished did you ever see any lien notices up called Notices of Lien?

A. I don't believe I did.

Q. You didn't see anything like that?

(No response.)

Q. Does your little book show the date it was finished?

(Testimony of K. D. Bradley.)

A. The last work on the house was 6-16.

Q. That would be the 16th day of June?

A. I believe that is right.

Q. Was that the last carpenter work or the last of any kind of work?

A. I believe that was the day that the painters finished. I beg your pardon, I believe that was the day that the last carpenter work was done on it.

Q. It was painting done after that?

A. I believe there was some painting where the carpenters finished up.

Q. Does your little book show the date the painting was finished? A. No, it didn't.

Q. The purpose of keeping this book was to calculate the time, I believe you testified?

A. That is right.

Q. And can you calculate the time from that book from the [111] beginning to the end?

A. Total hours for the job for carpenters?

Q. No, from the date the job began which you have noted there in your book until the day the last work was done, will your book show that?

A. It shows the total.

Q. Does it show the last day the work was done? A. Yes.

Q. The last day the painting was done?

A. No.

Q. Then your book doesn't show the total job?

A. The painting was done on contract so I could get the figures on that very easy.

(Testimony of K. D. Bradley.)

Q. You could get them now but your purpose, I believe you testified, in keeping this book was that you could check if Mr. Smith could make it in the time he stated he would so you noticed the delivery of the lumber so that you could calculate the entire time of the job. But you didn't note the finish of the job, is that not correct?

A. There might be two days difference there.

Q. Where have you kept this little book during the period of time from the date that appears therein until now?

A. Up until last fall when I quit advertising and selling any real estate I carried it in my pocket. Since that time it has been in a folder that I have to keep all real estate materials [112] in it in my house.

Q. Do you have any other books like that on the job? Is that the only book you have?

A. No, I have others.

Q. But not on this job?

A. Not on this job.

Q. Were you interested in the Seifert job?

A. No.

Q. You didn't keep any book on that job?

A. No.

Q. Does your book show the date the cinder blocks arrived?

A. The first load of blocks was May 5th.

Q. Were there other loads? A. Yes.

Q. Does your book indicate the dates of those other loads? A. No.

(Testimony of K. D. Bradley.)

Q. It does not? Does your book indicate the dates that electrical materials were delivered?

A. No.

Q. It does not? Does your book indicate the date the shingles were delivered for the roof?

A. No.

Q. It does not. Did your book indicate the date the flooring was delivered? A. No. [113]

Q. Does your book indicate the delivery of any of the fixtures? A. No.

Q. Was there a stove and refrigerator put in the house?

A. I don't know whether the furnishing of the house included a refrigerator or not.

Q. But your book doesn't show the delivery of any of those items? A. No.

Q. Nor the date of the painting? A. No.

Q. Nor the arrival of the painting material?

A. No.

Q. All your book does show is the arrival of the lumber, the arrival of the box from the property next door and the arrival of the cinder blocks, is that correct?

A. My book doesn't show the arrival of a box from next door.

Q. You were testifying that the box came over to the property for use as a tool box, you were not testifying from your book then when you testified to that?

A. I believe my statement was that I didn't know what date that box came over.

(Testimony of K. D. Bradley.)

Q. You had occasion recently to locate this little book in your files, did you? A. Yes.

Q. Did you discuss the book and the figures therein with Mr. [114] Grigsby at some previous time? A. Yes, I believe on two occasions.

Q. Two previous occasions in connection with this trial? A. Yes.

Q. Now, I believe your testimony in connection with your coming there in the morning and staying most of the day would have made it possible for you to be there when all these other things happened. You made no notation of those because you weren't interested in those items?

A. Only interested in the time and the cost.

Q. Do you know from your records the exact cost of the basement alone?

A. No, but I can get it.

Q. But that book won't show it? A. No.

Q. Will it show any feature of the house—cost of any feature of the house?

A. Yes, shows extra material and labor used in the basement for Mrs. Cutting for some apartments that she was going to have Mr. Smith finish off in the basement for her.

Q. Were they ever finished off?

A. They were never.

Q. Just discussion about it?

A. Just carried it through to making the necessary installations that would make it easy to do when she was ready for it. [115]

(Testimony of K. D. Bradley.)

Q. Were you present during any conversations between Mr. Smith and Mrs. Cutting?

A. I was.

Q. At her office or out on the property?

A. On the property in the basement.

Q. Now, Mr. Bradley, I believe you testified that you were not ever out at the house again after the carpenter work was finished?

A. I don't believe that I was ever in the building after the carpenters and painters left. I was out there at one time to help Smith move his tools.

Q. When did Smith move his tools, does your book show that?

A. I couldn't say what day it was.

Q. Was it after this painting was finished?

A. Yes.

Q. And the painting was finished sometime after the 16th of June?

(No response.)

Q. You testified the carpenter work was finished on the 16th and you didn't know when the painting finished?

A. That is right.

Q. You were not present when Mr. Smith gave the keys to Mrs. Cutting?

A. I believe Mrs. Cutting came over to my house and got the key, if I remember right. [116]

Q. Did you make a notation of that?

(No response.)

Q. Did you make a notation of that and did she

(Testimony of K. D. Bradley.)

come over there at your request or Mr. Smith's upon assertion that the house was finished and read for delivery?

A. No, I believe she said when she came to the house she wanted a key to show it so some people.

Q. You figured from that—did you mean by that some real estate people that she was showing the house to for sale?

A. I don't believe—don't know whether it was for sale or not.

Redirect Examination

By Mr. Robison:

Q. You have testified, Mr. Bradley as to one tool box that was used on the job prior to the time the piano box came over and you said it was your own tool box and gave the dimensions. Were the upright dimensions of the box the same on both sides? Was it a rectangular box?

A. I think what would be considered the back side of the box was exactly the same height as the front. It might have been an inch difference.

Q. And did you see your tool box every day when you were out on the job? Did you see that box of yours?

A. If I claim the tool box. I think I paid to have it made and at the time I left Anchorage in February, 1947, I gave [117] it to Mr. Smith.

Q. Did you say it was his box, then? He owned the box during the time this job was done?

(Testimony of K. D. Bradley.)

A. That is right.

Mr. Robison: That is all.

Recross-Examination

By Mr. Butcher:

Q. Have you seen that box since?

A. Yes. I believe I can tell you where it is sitting right now.

Q. Where is it sitting?

A. On lot 9, block 3, the Saxton Subdivision.

Q. You are sure it is sitting there today?

A. It was before this big snow came. I don't know if they can find it now.

Q. You believe the depth of the snow is higher than the height of the box? A. I believe it is.

Q. During the time it was used on this job where was it sitting?

A. It was sitting at the east end of the work bench I would say about in line with the south side of the work bench on approximately 4 foot east of the work bench.

Q. And where was the work bench situated?

A. The work bench was sitting approximately, oh, it would be hard to say. I would say rough estimate as 40 feet from the [118] back of the lot and maybe 4 to 10 feet from Major Seifert's line.

Q. On the Cutting side?

A. On the Cutting side.

Q. Did you ever see this box standing on end?

A. I never did.

(Testimony of K. D. Bradley.)

Q. It could stand on its end?

A. Not open the doors.

Q. But with the doors closed it could stand on the end if someone sat it up there with the doors closed?

A. The doors were larger than the box to keep the water from dripping into the box.

It could still sit up on its end but you couldn't swing the door shut.

Q. But if it were closed and locked it could stand there forever, couldn't it?

A. Oh, sure.

Q. What kind of tools did Smith keep in it, do you know?

A. Well, he kept a Skill saw, quite a bit of extension cord, a sander, a little power drill.

Q. Shovel?

A. Short-handled shovel. Oh, just miscellaneous stuff like wrenches and one thing and another that you use around the place.

Q. Did he keep a pick in it? [119]

A. I don't believe he did. I wouldn't say for use.

Q. Are those all tools normally used on the job?

A. Well, short-handled shovel, hand-axe, wrecking bars and stuff like that are generally used on most jobs.

Q. Wrecking bars were in this tool box too?

A. That question again, please?

Q. This tool box contained wrecking bars as well as these other items?

(Testimony of K. D. Bradley.)

A. I wouldn't swear to it what tool was in that box.

Q. If there were all tools regularly used then sometime during the day the tool box would be empty, would it not?

A. The tool box would be what?

Q. Empty? A. It could be.

Mr. Butcher: That is all.

Further Redirect Examination

By Mr. Kay:

Q. Mr. Bradley, you said the top was bigger than the box? A. That is right.

Q. It means it had a ledge that stuck out around the box? A. That is right.

Q. If it stood up on end then it would tilt over to one side?

A. It would have to unless set on blocks.

Q. Did you ever see it at any time out there on the place in that position? [120]

A. I never did.

Q. Did you see a lien notice of any kind of a piece of paper of any kind tacked on that box at any time during construction?

A. I never did.

(Witness excused.)

The Court: Another witness may be called.

Mr. Kay: I would like to call Mr. Goudchaux.

HARRY GOUDCHAUX

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. State your name, please?

A. Harry Goudchaux.

Q. Where do you live, Mr. Goudchaux?

A. 10th and C in Anchorage.

Q. And where are you employed?

A. Ketchikan Spruce Mills.

Q. How long have you been employed in Ketchikan Spruce Mills?

A. Three and one-half years.

Q. Were you employed by Ketchikan Spruce Mills during April, May and June, 1948?

A. I was.

Q. And what is your capacity at Ketchikan Spruce Mills?

A. Bookkeeper. [121]

Q. In that capacity do you keep the books and records of that company?

A. I do.

Q. Are you familiar with a job on which Ketchikan Spruce Mills supplied the materials known as the Cutting job?

A. I am.

Q. And do you have any record—original record—Mr. Goudchaux, indicating the first date upon which lumber was supplied by you to the Cutting job?

A. I have our complete list of sales picture for the month of May.

(Testimony of Harry Goudchaux.)

Q. Would you refer to that month and tell me what day the first shipment went to the Cutting job? A. May 3rd.

Q. And what did that shipment consist of?

A. Two by eights, two by sixes, four by sixes, common spruce and shiplathe.

Q. What is the size of the shipment, can you assert?

A. It was about—a little over 3,200 feet of lumber.

Q. Go over that again and what other dimension lumber.

A. I can give it to you in detail, if you wish.

Q. Please do.

A. 90 pieces 2 by 12 foot; 64 2 by 6; 14; 64 2 by 6; 12.

The Court: What was the last one?

The Witness: 64 pieces 2 by 6, 12-foot long; one 4 by 6, 12-foot; 12 pieces of 1 by 8-foot shiplathe. Ten pieces 6 by [122] 12 foot common spruce.

Q. That is the load which was delivered on May 3rd?

A. That was the first load that went out to the Cutting job.

Q. Was there any more lumber delivered on May 3rd, do you know? Check there and see if there was a second shipment the same day?

A. 2,300 board feet of shiplathe.

Q. 2,300 feet of shiplathe? A. Yes.

Q. Made on May 3rd, too? A. Yes, sir.

(Testimony of Harry Goudchaux.)

Q. Two truckloads of lumber went out there on May 3rd? A. Yes, sir.

Q. And they were receipted for?

A. Signed by Russell W. Smith.

Q. To whom were those billings made?

A. Audrey Cutting.

Q. Did you have occasion at any time after May third during construction of this house to send a bill to any one for the material supplied to the job by the Ketchikan Spruce Mills during the month of May.

A. All of our bills during the month of posting and about the end of the month usually the day before the last day or possibly the last day of the month, I make up the statements, put the copy of the original invoice which goes to the customer. They [123] are put in an envelope and taken to the post office.

Q. Did you place these original invoices in an envelope and address such an envelope in connection with this job? A. I did.

Q. And to whom did you address that envelope?

A. That was addressed to Audrey Cutting.

Q. And did you place postage on that envelope?

A. Postage was placed on the envelope.

Q. And did you place it in the United States Mail?

A. It was placed in the United States Mails. At times we have some of them that are not properly addressed and come back to us but this one did not come back to us from the post office.

(Testimony of Harry Goudchaux.)

Q. You are certain of that?

A. I am certain of that.

The Court: Counsel for defendant may examine.

Mr. Butcher: Just a couple of questions, Harry.

Cross-Examination

By Mr. Butcher:

Q. You don't know if Russell Smith ordered lumber from any other lumber company, do you, from your own knowledge?

A. I understood that he did not.

Q. You understood that? In what way did you understand it?

A. From some of the workmen and his conversation.

Q. You don't know of your own knowledge, however, that he did not? [124]

A. Well, no, not to my own knowledge.

Q. Harry, did you ever bill Russell Smith for this lumber? A. No.

Q. You never ever billed him? A. No.

Q. Did you ever have any personal contact with Mrs. Cutting?

A. Lyle Anderson instructed me that was to be billed to Mrs. Cutting and we had discussed Russell Smith before that and it was agreed that nothing would be charged to him.

Q. And, according to your best recollection these bills were made up for the lumber delivered during

(Testimony of Harry Goudchaux.)

the month of May and sent out about the last of May and addressed to Mrs. Cutting?

A. That was about—either May 30th or 31st.

Q. And that called for payment at what date?

A. 10th of June.

Q. On or before the 10th day of June?

A. That is right.

Q. Were any materials ordered after the first of June? A. Yes.

Q. And when were those billed?

A. Those were billed in June in a statement mailed at the end of June.

Q. They were billed in June and the statement mailed to the same part at the end of June?

A. That is right. [125]

Q. And you never received those envelopes back?

A. No, sir.

Mr. Butcher: That is all.

The Court: Court will stand in recess until ten minutes past four.

(Short recess.)

The Court: The witness, Harry Goudchaux may resume the witness stand.

Mr. Butcher: I was through with him, Your Honor.

Mr. McCarrey: I was through with him.

(Witness excused.)

The Court: Very well, another witness may be called.

Mr. Grigsby: I would like to ask Mr. Bradley to resume the stand for a few questions.

K. D. BRADLEY

previously called as a witness herein, being previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Bradley, with reference to the tool box that you were testifying about and cross-examined about, the one you were asked about it being stood on end, in other words, the green box belonging to you, when was that taken to the Cutting property?

A. I am going to have to look it up. It was taken over the first day that the power was turned on and that was on May 7th. [126]

Q. Where was it taken from?

A. From where I live.

Q. And it arrived on the property on the 7th, the same day the power was on? A. Right.

Q. How do you know it wasn't taken over before that?

A. I had no use to, there was no power.

Q. And you have a note about when the power was turned on? A. That is right.

Q. You are positive about that? A. Yes.

The Court: Counsel for defendant may examine.

(Testimony of K. D. Bradley.)

Further Recross-Examination

By Mr. Butcher:

Q. What did you use the power tools for?

A. There was a power Skill saw used for cutting out the dimensions for the house.

Q. And you needed that to cut the forms for the basement to put in the concrete, didn't you?

A. That again?

Q. You needed that for your forms and your construction generally?

A. Well, all the floor joists and all the blocking and rafters—jack rafters—everything had to be cut out.

Q. There was none of that construction then that occurred [127] until after the Skill saw got there?

A. That is right.

Q. No construction occurred until after the 7th day?

A. The forms were built to form the concrete form.

Q. What did you use to cut those out with?

A. Very little cutting to that.

Q. What kind of forms do you use for a concrete floor?

A. I believe they used 2 by 6 on the sides and ends and then they used riders through there, I believe were 2 by 4's.

Q. Those had to be cut, did they not?

A. They might have to be cut off square at the end.

(Testimony of K. D. Bradley.)

Q. Does your little book show anything about when the construction—you testified that the lumber arrived there on the 3rd, now does your little book show the date the first material started to be cut up and put into the property?

A. It shows that the concrete was poured for the floor of the building on May 5th, prior to that there would be cutting of 2 by 6's and a little shiprock and just enough stuff to lay out a building.

Q. But very little of that and you didn't need the power tools?

A. Didn't need a power saw because it would be all straight out cutting.

Q. Don't you use it for everything after you get going in the construction of a building?

A. In using a power saw they generally use a template and then [128] they cut maybe 40 or 50 pieces the same size or some measure, maybe ten pieces or maybe five pieces.

Q. Except for a small amount of cutting then the primary construction didn't occur until the 7th?

A. No, sir, it wasn't necessary to use a power saw.

Q. And this small amount of cutting could have been done in a small amount of time on the fifth, could it not? A. Yes, sir.

Q. I believe you testified that in connection——

Mr. Butcher: Your Honor, in order to ask this question I am going to have to refer back to this tool box and we have finished with the witness on that subject. Mr. Grigsby has called him back. Is the examination limited to the scope——

(Testimony of K. D. Bradley.)

The Court: If something is overlooked Counsel may go into it.

Q. (By Mr. Butcher): This tool box, Mr. Bradley, I believe you testified had a shovel and axe and wrecking bars, is that right?

A. I wouldn't swear as to just exactly what tools were in there except that it did have the Skill saw in there and the power sander.

Q. And you testified there was a shovel in there?

A. Miscellaneous other stuff in there—extension cords.

Q. And an electric sander. What is the size of the electric sander? [129]

A. I couldn't tell you the exact dimensions of it. It is a twirler sander.

Q. 12 inches high and 12 inches long?

A. I wouldn't venture to say.

Q. You are a man who has had a great deal of experience in this field, what are the general dimensions of a sander?

A. It would be pretty hard to say on that because there are different makes of different cases.

Q. You know the one they had in this case; you know that, don't you?

A. I would say approximately 12 inches long and 4 inches in diameter.

Q. And how big was the skill saw?

A. It was what was considered a 6-inch. I believe it was a 6-inch.

Q. Has a 6-inch blade?

(Testimony of K. D. Bradley.)

A. I might be mistaken but it wasn't over a 6.

Q. And the rest of the saw, the guard surrounds that and is built up over the motor?

A. Yes, regular Skill saw, Black & Decker.

A. And that was in this box too; that was in this box?

The Court: Pardon me. I have the greatest difficulty in hearing counsel. I am straining all the time to get it and I would like to make it easy to hear.

Mr. Butcher: Am I speaking loud enough for you? [130]

The Court: Yes.

Q. (By Mr. Butcher): And besides that there was miscellaneous cord and other items in the box?

A. Right.

Further Redirect Examination

By Mr. Grigsby:

Q. Will you give me the dimensions of that box again?

A. Well, that would be pretty hard to just say. That box was made in '43 for me and if I remember the dimensions correctly it was 36 inches long, it could have been maybe 40, but I don't think it was over 36. And if I remember that box right it was approximately, oh, say 20-24 inches wide and it wasn't as high as a chair quite, I would say.

Q. About 17 inches. Have you got it yet?

A. It doesn't belong to me, it belongs to Smith.

Q. Do you know where it is? A. Yes.

(Testimony of K. D. Bradley.)

Q. Where is it?

A. Well, before the big snow came it sat on lot 9, block 3 in the Saxon Subdivision.

Q. And as far as you know it is there yet?

A. Well, the last time I was out there there was no tracks over there that hauled it away.

Mr. Grigsby: That is all. [131]

The Court: Any further examination?

(No response.)

The Court: You may step down.

(Witness excused.)

Mr. Grigsby: Call Mr. Baxley.

A. L. BAXLEY

called as a witness herein, being previously duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. Mr. Baxley, you testified before I believe that your first day's work out there as a carpenter was May 3rd? A. That is right.

Q. Were you out there the day that the first lumber arrived? A. Yes, sir, I was.

Q. On what day was that?

A. It was on May 3rd.

Q. What did that lumber consist of, if you remember?

(Testimony of A. L. Baxley.)

A. As I remember that was shiplathe, 2 by 6's and 2 by 8. That came in two truck loads.

Q. You mean the shiplathe came in two truck loads?

A. No, the entire lumber, the shiplathe was on one load.

Q. Now with reference to a tool box that was used by the carpenters, do you remember that? The tool box that was used by the carpenters to put their tools in?

A. Yes, I do. [132]

Q. And what was the size of it?

A. Well, they were two different boxes with tools in them later.

Q. I mean the one that came from the Seifert apartment?

A. That was a quite large box. I would say it was five and one-half by six feet in size.

Q. And how high was it from the way it sat on the ground?

A. That was approximately three feet high.

Q. Was the lid on?

A. Yes, there was a lid on it.

Q. Do you know when that arrived on the Cutting property?

A. I couldn't state the exact date, no.

Q. Was it there on the 1st of May?

A. No, sir, it was not.

Q. Was there any tool box?

A. There were not.

Q. On the 1st of May?

A. No, sir.

(Testimony of A. L. Baxley.)

Q. And do you know when the first beam or post was put in the basement such as Mrs. Cutting described, was it one on which she posted a notice?

A. That I couldn't say the exact date, no, because I wasn't the man who sat the post in there.

Q. Do you know what was the first work done on that basement after the excavation? [133]

A. We sat the forms and poured the flooring.

Q. And you took part in that?

A. I did, yes, sir.

Q. And the first day you worked was it the 3rd?

A. Yes, sir.

Q. Was there any post there at that time?

A. There were not.

Q. And how long after that was there a post such as described by Mrs. Cutting?

A. That wasn't put there until after the sub-flooring was on.

Q. How long would that be?

A. Well, I would say that must have been around approximately the 10th or 12th of May.

Q. Now, Mr. Baxley, at any time when you worked on that job did you ever see any notice of liens or notice of non-liability for a lien?

A. I did not.

Q. Anywhere on the premises?

A. I did not.

Q. After that tool box was placed there did you have occasion to go to it every day?

A. I did.

(Testimony of A. L. Baxley.)

Q. If there had been a notice there such as has been put in evidence here would you have seen it?

A. I would, yes. [134]

Mr. Butcher: I object to that.

The Court: Overruled.

Q. (By Mr. Grigsby): I will hand you this paper, did you ever see such a paper as that anywhere on the premises? A. I did not.

Q. If that had ever been on that tool box would you necessarily have seen it?

A. I would have, yes.

Q. If you had seen it would you have continued to work there? A. Absolutely I would not.

Q. Did you work in the basement?

A. Yes, sir, I worked some in the basement.

Q. Did you ever see one like that in the basement? A. I did not.

Q. Did you handle the lumber after it was brought out there with the other men?

A. I helped to handle it, yes, sir.

Q. Did you ever see such a paper on that lumber pile? A. No, sir, I did not.

Q. On any lumber pile? A. No, sir.

Q. Or any place? A. No, sir.

Q. Or hear of one? [135] A. No, sir.

Mr. Grigsby: That is all. Just a minute.

Q. Do you know how long after you had been working before the box that has been described as similar to a piano box was moved on to the Cutting property?

(Testimony of A. L. Baxley.)

A. I couldn't name the exact date, no, but it was quite sometime after the structure had started.

Q. Were you there when the furniture arrived at the Seifert home? A. Yes, sir, I was.

Q. And was it sometime after that?

A. Yes.

Q. A week?

A. I would say it was a week or more.

Mr. Grigsby: That is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Baxley, you stated you went to work there on the 3rd? A. That is right.

Q. And on the third arrived these various loads of lumber? A. Yes, sir.

Q. And in answer to Mr. Grigsby's statement was there any box there on the 1st you said "Absolutely not"? A. There were not. [136]

Q. And there was no lumber there on the 1st?

A. No, sir.

Q. And you didn't go to work until the 3rd?

A. That is right.

Q. How do you know there wasn't any lumber there on the 1st or a box?

A. Because I was there doing the excavation.

Q. Were you working then?

A. I were not.

(Testimony of A. L. Baxley.)

Q. You were doing the same thing as Mr. Bradley was doing—watching, is that correct?

A. That is not correct.

Q. What were you doing there?

A. I was merely helping Mr. Smith stake out the ground before the excavation started, without any cost, hauling him in my car back and forth.

Q. When did he stake that ground out, do you recall? A. Not the exact date.

Q. You don't have a little book?

A. I do not carry any book.

Q. You don't carry any book. Now I believe you testified that if you had seen such a notice, which you didn't of course, that you wouldn't have worked there any longer, is that correct?

A. That is right, I would have not worked any more until I found out what it was all about. [137]

Q. Did Mr. Smith tell you that he had a contract with Mrs. Cutting in which he was to construct the building and receive the money afterwards? A. That is right.

Q. And that he made a deal with you whereby you were to receive a 10c bonus for waiting for your money until afterwards?

A. That is right.

Q. And did you not know as an independent contractor Mr. Smith was responsible for the bills?

A. I did not.

Q. You didn't know that? A. No.

Q. Have you ever worked with Mr. Smith before? A. No, sir.

(Testimony of A. L. Baxley.)

Q. Have you ever worked with another independent contractor? A. Lots of them, yes.

Q. And you have worked with lots of them here in Alaska? A. Not in Alaska.

Q. Outside? A. Outside, yes.

Q. And from that experience don't you know an independent contractor usually assumes responsibility for the debts? A. Not always.

Q. And don't you see those notices posted?

A. I do not. [138]

Q. Have you ever seen those notices posted?

A. No.

Q. No place? A. No, sir.

Q. You have always worked for independent contractors?

A. Yes, outside of the government.

Q. And those contractors had jobs on other projects—other people's projects?

A. That is right.

Q. And you never saw any of those notices?

A. Not a one.

Q. And you never saw one on the Cutting property?

(No response.)

Q. You never saw one until you saw this one?

A. That is right.

Further Redirect Examination

By Mr. Grigsby:

Q. Do you recall when the green box belonging to Bradley was brought there?

(Testimony of A. L. Baxley.)

A. I beg your pardon?

Q. Do you recall when the green tool box belonging to Bradley was brought to those premises?

A. No, I don't recall the date.

Q. Do you know how long it was after the 1st of May?

A. Well, it was a week or so afterwards because the electricity [139] hadn't been turned on yet.

Mr. Grigsby: That is all.

The Court: That is all.

(Witness excused.)

Mr. Grigsby: Call Mr. Rankin.

EDWARD RANKIN

called as a witness herein, being first duly sworn,
testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. State your name?

A. Edward Rankin.

Q. Did you state your name? A. Yes.

Q. Will you repeat it?

A. Edward Rankin.

Q. Mr. Rankin, I believe you testified before that you worked on that Cutting job for Russell Smith from the 17th of May to sometime in June?

A. Until the 12th of June, that is right.

Q. During that time did you ever see any

(Testimony of A. L. Baxley.)

notice—I will show you this paper, did you ever see such a paper such as that out on those premises?

A. No.

Q. Do you remember a tool box out there which had been made [140] out of a former piano box?

A. Yes.

Q. Is that where you kept your tools?

A. Yes.

Q. Did you go there every day?

A. Every day.

Q. If there had been such a notice as that posted on that tool box would you have seen it?

A. Absolutely.

Q. And would you have worked there if you had seen such a notice?

A. No, I would have questioned it at least, I know.

Q. Was any such a notice ever called to your attention anywhere on the premises? A. No.

Q. Let's see, what was the last day you worked?

A. June 12th.

Q. You weren't there when that tool box was first brought to the premises?

A. No, it was there when I came.

Q. What was being done when you got there?

A. Well, I started May 17th and I started right on the subfloor that day.

Q. The subfloor, you mean the floor to the basement?

A. The basement is in and the floor joists were up and I [141] started on the subfloor that day.

(Testimony of Edward Rankin.)

Q. And did you observe the joists?

A. Yes, sir.

Q. The support posts?

A. No, not that day, but I was in the basement during the day and saw the posts, yes, walked around it.

Q. Would you have seen such a notice on any of those posts?

A. I would have seen one, yes, if there was one.

Q. Was there one there?

A. I did not see one, no.

Mr. Grigsby: I think that is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Rankin, I will just ask you a couple of questions. You didn't start there until May 14th?

A. May 17th.

Q. And you don't know what was posted there when that job was started, do you?

A. What do you mean?

Q. Of your own knowledge you don't know whether there was any posting of notices?

A. I didn't see any.

Q. You didn't see any from the 17th on?

A. Yes, I saw the building permit. Yes, I saw the plumbers' [142] permit and I saw the electrician's permit.

Q. You didn't see any claims for liens?

A. No.

(Testimony of Edward Rankin.)

Q. Notices for claims? A. No.

Q. Notices of non-responsibility? A. No.

Q. Did you—you didn't see anything like that?

A. No.

Q. What was your particular job?

A. General construction.

Q. Carpenter? A. Yes.

Q. Construction? A. Yes.

Q. And you say you would have discontinued working had you seen such a notice? A. Yes.

Q. Did you not enter into an agreement with Mr. Smith whereby you would have waited until the whole job was finished until you looked for your money? A. Yes, that is right.

Q. And for that you would have received a 10c bonus? A. Yes.

Q. And you knew Mr. Smith was going to pay according to his [143] promise, did you not?

A. Mr. Smith—the way I got it was Audrey Cutting would have paid or we would get our money when the job was done.

Q. You would get your money from Mr. Smith?

A. And I read the contract between her and Mr. Smith.

Q. You knew you were to get your money from Mr. Smith, is that correct, she was to pay Mr. Smith?

A. I was to be paid when the job was done.

Q. By Mr. Smith or Mrs. Cutting?

A. I wouldn't care who I got it from.

(Testimony of Edward Rankin.)

Q. You read the contract? A. Yes.

Q. You remember it saying she would pay her \$9800 and he would be responsible for any debts?

A. I can't specify any line in that contract, no.

Q. Then you are telling us that you were looking to Mrs. Cutting for your pay? A. Yes.

Q. And if you had seen that notice then you would have quit right then? A. Yes.

The Court: Any further examination.

Further Redirect Examination

By Mr. Grigsby:

Q. In other words, what you mean to say is that you understood [144] from Smith that he couldn't pay you until Mrs. Cutting paid him?

A. Yes.

Mr. Butcher: That question is entirely leading.

The Court: Objection is sustained.

A. That is what I meant.

Q. (By Mr. Grigsby): If you had seen a notice, with the information you had to the effect that Mrs. Cutting wouldn't be responsible for the bills, what would you have done?

A. I would have walked off the job.

Mr. Grigsby: That is all.

The Court: That is all. Another witness may be called.

(Witness excused.)

Mr. Grigsby: Mr. Bullerdick.

RAY BULLERDICK

called as a witness herein, previously having been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. State your name?

A. Ray Bullerdick.

Q. You have been sworn in this case?

A. I have.

Q. And I believe you testified you went to work on the Cutting [145] job for Russell Smith on the 15th of May, is that right? A. That is right.

Q. And you quit on the 16th of June?

A. Yes, sir.

Q. And worked every work day during that time?

A. I believe with the exception of one-half day I was off.

Q. Now during that time did you ever see such a notice as the paper I hand you posted anywhere on the premises? A. Absolutely not.

Q. Do you recall a large tool box similar to a piano box in which tools were kept—carpenter tools were kept? A. I do.

Q. Do you know when that arrived on the premises? A. No, I do not.

Q. Was it there when you went to work on the 15th?

A. I recall the box in question being on the

(Testimony of Ray Bullerdick.)

premises but not in use as a tool-room box container.

Q. On the 15th? A. On the 15th.

Q. And after that was it in use—was anything done with it after you first saw it there?

A. What is the——?

Q. Was anything done with it, was it altered in anyway?

A. When I first started to work there in the evening at the close of the working day Mr. Smith said “We have no good place [146] to store the tools.” Your hand tools, hand box, suitcase style. “But in a day or two I will have a box for you with a lid on it and a lock.” So for two or three days, I couldn’t say exactly, it was no concern at the time, I stored my tools under some building materials there, as I remember it it was pieces of roofing or debris of some sort, and I believe one evening I stored them in the basement; that was approximately three nights after I commenced work on the 15th.

Q. And after that where did you store them?

A. This large tool box referred to before.

Q. Have you seen that tool box lately?

A. Yes, sir.

Q. When? A. Nine o’clock this morning.

Q. And did you find the number of it with reference to a shipment? A. Yes, sir.

Q. And write it down? A. I did.

Q. And what was the number on it?

A. The number of the box were stenciled “Box No. 1.”

(Testimony of Ray Bullerdick.)

Q. That was stenciled on the Box No. 1 and then a dash 30?

Mr. Butcher: Your Honor, I object to this question as not being proper rebuttal. The testimony put in by Major Seifert established the delivery of the box and there has been no question [147] raised about his delivery of the box on that date and according to the records which he introduced in evidence that is in those military records and this purports to re-establish that. It is not proper rebuttal.

Mr. Grigsby: This is rebutting the testimony of Mrs. Cutting.

The Court: Objection is overruled.

Q. (By Mr. Grigsby): Did you draw a picture of that box?

A. Yes, I drew that rough sketch.

Q. Did you copy the markings on the box?

A. I did.

Q. Are those the markings you copied?

A. They are.

Mr. Grigsby: We offer this in evidence.

The Court: Show it to counsel for defendant.

Mr. Butcher: May I ask a question or two of the witness?

The Court: Yes, with respect to the admissibility of the exhibit.

Mr. Butcher: This figure here, Mr. Bullerdick, is that a 6?

The Witness: 6 feet, no inches.

(Testimony of Ray Bullerdick.)

Mr. Butcher: And is this box in the position now according to this drawing that it appeared on the property out there?

The Witness: It is in the position but not— It is in [148] the position with reference to the earth but not geographically.

Mr. Butcher: I mean in relation to the earth and the lid was on the end then as you have shown it here?

The Witness: Right.

Mr. Butcher: And if the box were stood up on its end, as if the piano were in it, it would be about 6 feet high?

The Witness: It would have been exactly 6-foot high.

Mr. Butcher: After it was commenced to be used as a tool box it was laid down on its back?

The Witness: In its present position.

Q. (By Mr. Grigsby): How high would it extend above the ground as it was used?

A. I can't remember the exact measurement—three feet or inch or two.

The Court: Is there an objection?

Mr. Butcher: No objection.

The Court: It may be admitted and marked Exhibit RR.

Q. (By Mr. Grigsby): Did I question you with reference to this notice?

A. As to whether I had ever seen it before, sir.

Q. Now, Mr. Bullerdick, this box in length was 6 feet, you say, the longest dimension of it?

(Testimony of Ray Bullerdick.)

A. The greatest dimension.

Q. And did you ever see it upright like a piano would set?

A. No. As I recall it, it was lying at all times regardless [149] of whose premises it was on.

Q. Have you got the dimensions marked on it as to how high it was the way it laid down there, the way you used it for your tools, is it marked there? A. Yes, sir.

Q. What is it?

A. Three feet two inches, the height at the highest point.

Q. Was there any slant where the lid was?

A. A straight line on it as to that dimension of the top deck from this point to this point and a slant from this point from this point to this point of two or three inches as shown. That was done for the purpose of making a little watershed to which a piece of roofing was tacked protecting the tools.

Q. Now you went there every day, did you, to put your tools in the box after it arrived?

A. Yes, sir.

Q. If there had been any notice there of non-lien liability such as the paper I have shown you, would you have seen it on that box?

A. I am sure I would have seen it.

Mr. Butcher: I object. The question was leading.

The Court: The objection is sustained.

(Testimony of Ray Bullerdick.)

Mr. Butcher: I request that a notation be made that it be stricken from the record.

Mr. Grigsby: I believe my question—"If there had been [150] such notice on the box, would he necessarily have seen it?" It doesn't call for any answer——

The Court: The answer may stand.

Mr. Butcher: I misconceived the question. My objection will stand, then, too?

The Court: In deed, sir, and an exception will be noted.

Q. (By Mr. Grigsby): And in that case what would you have done with reference to continuance of working?

A. I would have stopped work until I had determined the legal status of such a notice, as that as might impair our chances of recourse to law in collecting our money.

Q. How did you at that time understand and from whom you were to be paid for your work?

A. I understood that we would receive our money from contractor Smith.

Q. And when?

A. Immediately upon the completion of the project.

Q. Did you have any understanding as to where that money would come from?

A. The name Audrew Cutting—I hadn't met Mrs. Cutting up to that time. I had heard of her but the name, Audrey Cutting, was brought out

(Testimony of Ray Bullerdick.)

many times, but it was understood that she was responsible for the payment of all debts.

Q. If you had seen a notice in which she disclaimed responsibility—— [151]

A. What is it——.

Q. ——then what would you have done?

Mr. Butcher: Your Honor, I believe he should if he is going to say what the notice contained, the responsibility to whom—It doesn't disclaim the payment completely.

Q. (By Mr. Grigsby): For the payment of any work on the property—If you had seen a notice signed by Audrey Cutting to the effect that she would not be *responsibility* for any labor on that property or materials, then what would have been your attitude?

A. What would have been my attitude if I had seen that notice?

Q. Yes.

A. I would have quit working at least until I determined what such a notice—how such a notice would impair my *changes* of collecting my wages through course of law.

Q. Did you ever see such a notice anywhere on those premises?

A. I never did, sir, as I remember.

Q. Or hear of one?

A. I don't believe I ever did.

Q. Don't you know whether you did or not?

A. That goes back for forty years.

(Testimony of Ray Bullerdick.)

Q. On that property?

A. I never saw any on that property, of course not, sir.

Mr. Gribsby: That is all. [152]

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Bullerdick, you went to work there on what date? A. 15th of May.

Q. Construction had been going on for sometime, had it not? A. Yes, sir.

Q. And on the 15th day of May there was no box in which to put your tools? A. No, sir.

Q. And Mr. Smith told you that if you would be patient and put your tools under canvas he would get a box in a few days with a lock on it?

A. In substance that is correct. The word "patient" wasn't mentioned.

Q. And then within a few days he produced a box with a lid on it? A. Right.

Q. And that is the box that you have described in your drawing, is that correct? A. Right.

Q. And from then on you used that box for your tools? A. That is right, sir.

Q. And that box resided in a *declining* position, that is, it was down on the large flat surface and not upright on its end or sides? [153]

A. That is right.

Q. That was all the time you saw that box that you have drawn the picture of?

(Testimony of Ray Bullerdick.)

A. That is right.

Q. Had there been another box there on the first day of May or the third day of May standing in an upright position you wouldn't have known anything about it, would you?

A. No, I am sure of it, I hadn't been there until the 15th. I passed by the job a time or two but that was all, and chatted with the boys, maybe.

Q. You hadn't had any plans to work on the project at that time, had you?

A. Not at that time.

Q. So, from the first day of May until the 15th if there were a large box standing on the rear of the lot you wouldn't have seen it, would you?

A. Not likely.

Q. Mrs. Cutting could have posted such a notice on such a box and you wouldn't have seen it during that time?

A. That is right.

Q. And the only box you know anything about is this box you have drawn a picture about?

A. That is the only box that I know anything about that could be called much of a box.

Q. Now, Mr. Bullerdick, you have testified what you would [154] have done if you had seen such a notice as Mr. Grigbsy termed it "A notice which stated that Mrs. Cutting wouldn't be responsible for any payment on the labor and materials on the project," if you had read such a notice you would have quit the job until you asserted your legal status?

A. Quite right, sir.

(Testimony of Ray Bullerdick.)

Q. Is that what you testified? Suppose you had seen a notice which said "Be it known that I, Audrey Cutting, guardian of Sylvia Henderson..." This is Defendant's Exhibit No. 102. "...a minor child, of Anchorage, Alaska, will not be responsible for any liens or bills for the building or construction of a home located on lot 2, block 37 D, South Addition, Anchorage, Alaska. On the 20th day of April, 1948, a contract was entered into by and between Audrey Cutting and Russell W. Smith, contractor, to build a house located on Lot 2, Block 37 D, South Addition, Anchorage, Alaska, according to specification as covered by contract." Now, you knew that there was a contract, did you not, with Mr. Smith between Cutting and Smith?

A. I understood there was, yes, sir.

Q. And I believe you testified to the other day that under the terms of that contract no payment was to be made until the house was delivered completed, is that not correct? You knew that?

A. I believe that is correct, Mr. Butcher.

Q. And you entered into an agreement with Mr. Smith that you [155] were to accept a 10-cent bonus for waiting for your money until after the house was completed?

A. That is right.

Q. Now, if you had seen a notice which stated that Mrs. Cutting had entered into a contract with Mr. Smith for the construction of the house would you have walked off the job?

A. If I had of what?

(Testimony of Ray Bullerdick.)

Q. If you had seen a notice which stated that Mrs. Cutting had entered into a contract with Mr. Smith to build this house, would you have walked off the job?

A. If I had seen a contract between Mrs. Cutting and Smith?

Q. No, if you had seen a notice which stated that a contract had been entered into would you have walked off the job?

A. Why should I? Was there any reason why I should?

Q. No, except this notice says both—says she shall not be responsible and says she has entered into a contract. That is all.

Mr. McCarrey: I would like to query Mr. Bullerdick pertaining to the box.

Further Redirect-Examination

By Mr. McCarrey:

Q. Was this box located upon the lot in position to the house in the relative position to the house?

A. When I first arrived on the job, Mr. McCarrey?

Q. Yes. [156]

A. It was approximately half-way—half and half on the two properties. The box, as I recall it, would come somewhere near, probably, the line would come somewheres close to dividing the box. I wouldn't say which side it may have favored.

Q. Was it up against the Seifert house?

(Testimony of Ray Bullerdick.)

A. No, it wasn't up against it.

Q. Was it up against the telephone post or any post of any kind? A. I don't recall.

Q. Was the box so you could walk around it all the way around? A. I believe it was.

Q. Did you ever have occasion to walk clear around the box? A. Possibly.

Q. Do you know whether you did or not?

A. No, I couldn't answer that exactly.

Q. At any time did you see this particular notice upon that box? A. Where is it?

Q. This notice which was shown to you?

A. Did I ever see that on the box?

Q. Yes.

Mr. Butcher: I wonder if counsel is not covering exactly the same territory as previously covered.

The Court: I think so.

Mr. McCarrey: That is all. [157]

The Court: Any further cross-examination?

Mr. Butcher: No.

The Court: You may be excused, Mr. Bullerdick.

(Witness excused.)

The Court: The hearing will be continued. The court stands adjourned until ten o'clock tomorrow morning.

(Whereupon, at 5 o'clock, p.m., the trial was continued until 10 o'clock, a.m., the following morning, Tuesday, February 14, 1949). [158]

Tuesday, February 15, 1949

The Court: Plaintiffs may call a witness in rebuttal.

Mr. Grigsby: Mr. Bell.

ARDEN BELL

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. Mr. Bell, you have been sworn?

A. That is right.

Q. I believe you stated you went to work on the property in question, being the house built by Russell Smith for Audrey Cutting, on the 3rd of May? A. Right.

Q. That was your first day's work as a carpenter there? A. Yes, it was.

Q. I will ask you whether on that day there was any lumber on the place?

A. Not 'til in the afternoon.

Q. On the 3rd of May? A. 3rd of May.

Q. Were you around that place before the 3rd of May? A. No, I wasn't.

Q. Did you witness the first delivery of lumber there? A. Well, I was on the job, yes. [163]

Q. Did you go there the morning of the 3rd of May? A. I did.

Q. Was there any lumber there then?

A. No, there wasn't.

(Testimony of Arden Bell.)

Q. Any pile of lumber? A. No.

Q. Now you heard the testimony that has been given in this case, all of it?—

A. Yes, I have.

Q. —with reference to a box that was used for tools by the carpenters, that was obtained from Seifert's place. Do you know when that was brought on to the Cutting place?

A. Well, I would say about ten days after I went to work—ten or eleven days after I went to work, or a week.

Q. Was there any tool box on the place except what you carried on, perhaps your own tools or the other carpenters, on the 3rd of May?

A. No.

Q. Did you hear the testimony about this box that was brought by Bradley? A. Yes.

Q. And used for the same kind of tools. Do you know when that was brought there?

A. It was brought as soon as they hooked up the power for their saw. They brought their saw in that box—the Skill saw. [164]

Q. That wasn't there the 3rd of May?

A. No.

Q. Was there any box used as a general tool box on the 3rd of May by the various carpenters?

A. No, there wasn't.

Q. I call your attention to this note, this paper here, which is Defendant's Exhibit 102, did you ever see such a paper as that anywhere on the

(Testimony of Arden Bell.)

premises where that residence was being constructed? A. No, I did not.

Q. Did you ever see such a paper as that on a tool box or any tool box? A. I did not.

Q. If it had been on that box——

Mr. Butcher: Objected to as leading.

Q. (By Mr. Grigsby): If it had been——

Mr. Butcher: It suggests the answer.

Q. (By Mr. Grigsby): If it had been on that box that was brought from the Seifert premises would you have necessarily seen it?

The Court: Wait a minute. Does counsel object?

Mr. Butcher: Yes, as leading.

The Court: Overruled. [165]

Q. (By Mr. Grigsby): Would you necessarily have seen it? A. I would.

Q. After that box was brought there you used it every day? A. I used it several times a day.

Q. Did you ever see such a notice on the premises? A. I did not.

Q. Were you on all parts of the premises?

A. I was.

Q. Were you aware when you went to work of a contract between Audrey Cutting and Russell Smith?

A. Yes, I was aware they had a contract.

Q. You have testified you had an agreement to wait for your wages until the building was completed? A. That is right.

Q. And if you had known or seen a notice from

(Testimony of Arden Bell.)

Audrey Cutting signed by her on the premises that she wouldn't be responsible for your pay, what would you have done?

A. Well, I would have looked into it right away. I wouldn't have worked any more until I found out.

Q. Did you ever know when you went to work or while you were working of Sylvia Henderson having any interest in the property, or hear of the daughter?

A. No, I don't believe so.

Mr. Grigsby: That is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. What day did you say you went to work there? A. May 3rd.

Q. The same day as Mr. Bradley?

A. Yes, the three of us.

Q. Were you around there any time prior to May 3rd? A. No, I was not.

Q. Mr. Bell, you stated you had an agreement with Mr. Smith whereby you were going to wait for your money until he had completed his contract?

A. That is right.

Q. And in consideration of that waiting you were to receive a ten-cent bonus? A. That is right.

Q. And you knew you were going to receive your money from Mr. Smith, did you not?

(Testimony of Arden Bell.)

A. I was to receive the money, yes, from Mr. Smith.

Q. You didn't look to Audrey Cutting for your money, did you?

A. In a way, he couldn't pay until she paid him.

Q. But that wasn't part of your contract? You had no contractual relations with Mrs. Cutting, did you? A. No.

Q. Just with Mr. Smith? A. That is right.

Q. Mr. Grigsby asked you if you had seen a notice stating that Mrs. Cutting was not responsible for the debts, asking you what you would have done and you said you would have investigated immediately to find out what your rights were, and wouldn't have worked until you had them ascertained, is that correct? A. That is right.

Q. Even though you were looking to Mr. Smith for your money? A. Absolutely.

Q. And if that notice had further stated that Mrs. Cutting had a contract with Mr. Smith, would it have still caused you to discontinue your work?

A. It would.

Q. It would have?

(No response.)

Q. Now, when you went there on the 3rd, did you see any kind of a tool box around there of any size? A. I did not.

Q. Did you see any large packing boxes?

A. No, there was none.

Q. No large packing boxes on the property?

(Testimony of Arden Bell.)

A. None.

Q. When did you see the first large box?

A. Well, as I say—the first box, you mean?

Q. The first large box you saw of any kind?

A. There was only one large box ever there. That was the [168] piano box brought from—to be used for a tool box.

Q. Didn't you ever see this box that has been described as three feet long and forty inches wide, and holding power drills, Skilsaws and sanders and wrecking bars and shovels?

A. Yes, I did, but I wouldn't call that a large box.

Q. Would call that a large box. Are you familiar with a notice of non-responsibility? Have you ever seen one before?

A. Never have.

Q. Never have seen one anywhere. Have you been in this business a long time?

A. About 35 years.

Q. And you have worked for contractors before?—

A. Yes.

Q. —who worked on buildings and private projects?

A. Well, mostly on large contracts, about the largest in the world—dams and Pearl Harbor.

Q. Have you worked on residences and buildings?

A. Well, not as much as I did the other.

Q. You have done work, though?

A. Yes.

Q. On many occasions?

A. Yes, I have.

(Testimony of Arden Bell.)

Q. And you have never seen one of these notices?

A. Never have.

Q. Were there notices posted around the property of other [169] kinds?

A. Yes, there was.

Q. What were those notices?

A. Permits—building permits.

Q. Do you recall what that permit said?

A. Well, I don't recall just how it was worded.

Q. Do you know who signed it?

A. Russell Smith.

Q. Signed by Russell Smith? A. Yes.

Q. That was the permit permitting Russell to build the house? A. Yes, I imagine so.

Q. Were there any permits put up there by Russell Smith stating he was the contractor?

A. That I couldn't say, I don't believe.

Q. You never saw any of those notices?

A. No.

Q. Do you recall them putting up a pole in the rear of the house to which they attached the electric wires? A. Yes.

Q. Do you remember seeing any notices on that pole?

A. Seems to me like at one time there was an electric permit or something on that.

Q. An electric permit?

A. Or something pertaining to that at first. [170]

Q. You don't remember what it said?

A. No.

(Testimony of Arden Bell.)

Q. Do you ever remember seeing Mr. Bradley around there, day after day? A. Yes, I do.

Q. Most of the day?

A. Well, at first he was there, I would say, most of the day.

Q. At the first part of the job?

A. That is right.

Q. Did he do any work there?

A. Well, I wouldn't say he done any work. He just helped, like, if we moved lumber or anything, he might take a hand in it. He didn't actually do any work for money.

Mr. Butcher: That is all.

Further Redirect-Examination

By Mr. Grigsby:

Q. Mr. Bell, did you hear Mrs. Cutting's testimony with reference to posting one of those lien notices on a post in the basement? A. I did.

Q. Do you know when the first post was erected in the basement?

A. Oh, let's see—basement was poured, I think, two days or so after I went to work. That would be after May 3rd. That would make it about the 5th.

Q. What was done on the 5th?

A. No, then the blocks were put up and the floor joists put in and a temporary post put in. Now, that was several days afterwards. Now, that was a temporary post put in, and that was removed.

Q. How long was it, after you went to work, before there was any post put in?

(Testimony of Arden Bell.)

A. Well, I would say about 6 or 7 days, something like that.

Q. Did you ever see any notice on any post in the basement? A. I did not.

Q. You worked in the basement?

A. Well, I was in and out of the basement only at first.

Mr. Grigsby: That is all.

The Court: Any further cross-examination?

Mr. Butcher: That is all.

The Court: Mr. McCarrey.

Further Cross-Examination

By Mr. McCarrey:

Q. Mr. Bell, in answer to one of Mr. Grigsby's questions, you answered there was no pile of lumber, is that correct? A. You mean——?

Q. On the morning of May 3rd?

A. No, there was none.

Q. Now, was there any lumber there at all, Mr. Bell, of any kind?

A. Not when I went to work. [172]

Q. I believe you stated that you knew about a contract between Mr. Smith and Mrs. Cutting, is that correct?

A. Well, all I know is what they told me.

Q. Did you ever see that contract?

A. I did not.

Q. Did you ever know who owned the land upon which the house is being built?

A. I never knew at all.

(Testimony of Arden Bell.)

Q. Now, calling your attention to the little green box which Mr. Bradley testified to, did you ever see a notice upon the little green box?

A. I never did.

Q. And I believe you testified that you never saw a notice upon the big piano box, is that correct?

A. That is correct, never did.

The Court: Any further cross-examination?

Further Recross-Examination

By Mr. Butcher:

Q. You state that there was no lumber there on the 3rd?

A. I say when I went to work on the 3rd.

Q. You mean, early in the morning?

A. (No response.)

Q. There was some later on that day?

A. There was some came in that afternoon. I couldn't say what it was. [173]

Q. So it was there that evening?

A. There that evening.

Q. There the evening of May 3rd?

A. That is right.

Q. And it was put in two piles, is that correct?

A. Well, as I recall right, there was two loads came in and there would be two piles.

Mr. Butcher: That is all.

The Court: That is all, Mr. Bell. Another witness may be called in rebuttal.

(Witness excused.)

Mr. Grigsby: We rest.

Mr. Kay: May we have a one-minute conference over here?

The Court: Very well, go ahead.

Mr. Kay: Your Honor, we would like to respectfully request a ten-minute recess.

The Court: The Court will stand in recess until ten minutes of eleven.

(Short recess.)

The Court: Counsel may proceed.

Mr. Butcher: The second amended answer which I filed yesterday contains an incorrect statement regarding the cost of the Russell Smith contract. It says \$9500 instead of \$9800, and I have corrected the copies here that I have.

The Court: Without objection the \$9500 figure may be [174] changed by the Clerk to \$9800, and I will remind the other counsel that replies are to be filed within two days from yesterday.

Court now stands in recess until 10:15.

(Short recess.)

The Court: Any further rebuttal testimony?

Mr. Grigsby: We rest.

Mr. Butcher: Defendants rest.

The Court: All parties rest. Are counsel ready to proceed now with the argument?

Mr. Butcher: I have a couple of motions that I would like to be heard on.

The Court: You may proceed, Mr. Butcher.

Mr. Grigsby: What is the motion here?

Mr. Butcher: Motion to dismiss because of failure—motion to dismiss on the ground that the complaints fail to state a cause of action.

* * *

The Court: Do you care to be heard further, Mr. Butcher? The motion is denied.

Mr. Butcher: May I have an exception.

The Court: Does counsel care to proceed now with argument?

Mr. Butcher: I have another motion, Your Honor.

Mr. Kay: That motion is denied as to all parties?

The Court: All of the lien claims, as I understand, and therefore being denied covers all of the lien claims and the various complaints and the complaints of intervention. The motion, however, the question of jurisdiction, was never waived and defendant has a right to raise it at any time if he can during the main argument.

Mr. Butcher: Your Honor, none of the liens, at least none that I have examined, have contained the name of Sylvia Henderson and Ketchikan Spruce. I have the claim of lien attached as Exhibit "A" on the Ketchikan Spruce bills and I find out that Audrey Cutting, Russell Smith and Ralph R. Thomas are listed and not Sylvia Henderson.

Your Honor, the name, Sylvia Henderson, who obviously is a minor, has appeared in this case in

numerous instances [188] through references in the complaints, through actually being named in the complaint as a minor, but in no case that I have been able to find has been named as defendant in the lien claims. However, I wish to call the Court's attention at this time that in spite of the evidence or together with the evidence which has been presented in this case that Sylvia Henderson is a minor; that Sylvia Henderson is not a ward of a guardian; that she has no guardian; and that she had no guardian during any of the times contemplated by this action during any of the times the work was furnished and up until the present time as far as I know.

The Court: Don't you appear for Miss Henderson?

Mr. Butcher: Your Honor, I am going to come to that in a moment. There has been no action on the part of the Court to authorize an attorney to appear for Miss Henderson and the law as I have been able to find it both in the Code—and I raise this now, Your Honor, because at one time I accepted service from Mr. Grigsby on behalf of Miss Henderson and told him at the time I accepted that I didn't know for sure that I represented her. I think I informed the Court at one time when we were discussing the settling of this that I wasn't certain that I represented Miss Cutting. But I have checked the law and I find the law absolutely forbids a representation of a minor unless that representation is made by the duly authorized legal rep-

representative of the minor, that is, the guardian, and that infant cannot appoint its own attorney, and for the sake of this motion, Your Honor, I am going to cite you several cases which are directly in point and also the cases which hold that any judgment handed down by a court where the guardian by official order of the Court has not consented to the minor being sued or through ordering in the court that that judgment can have no possible effect upon the minor.

The Court: Pardon me, before citing the cases. Was there not an order made here appointing Mrs. Cutting as guardian ad litem for the minor?

Mr. Butcher: Not to my knowledge.

The Court: The Court now makes such an order and the plea may be amended if necessary to conform with that order and to bring Sylvia Henderson into Court. Counsel was in error in not heretofore advising the Court that he did not represent Miss Henderson. I assumed that it had all been arranged.

Mr. Butcher: Your Honor, I didn't know this law and discovered it myself.

The Court: Counsel may proceed.

Mr. Butcher: May I cite, Your Honor, the cases that go to the point of appointing——

The Court: I think I know the law fairly well but I would be glad to have it.

Mr. Butcher: This is the case of * * * And I call your attention, Your Honor, to Wilton on Contracts, Volume 1, that [190] is the large set, sec-

tion 248, page 735, and that particular section, Your Honor, refers to the ability of an infant to select the attorney and also goes very strongly to the point that no judgment at all of any kind can be exercised against an infant who has not been represented by an attorney selected by the guardian.

My request is that Your Honor, which I probably didn't state originally, is that the actions be dismissed insofar as Sylvia Henderson is concerned.

The Court: The motion will be denied. Mrs. Cutting, do you choose Mr. Butcher as the attorney for Sylvia Henderson, a minor, or do you want to get another attorney to represent her?

Mrs. Cutting: No, sir, I believe that it will be quite all right to have Mr. Butcher represent her.

The Court: Mr. Butcher has already represented her, is that not true?

(No response.)

The Court: I think this point comes with ill grace at the end of the trial.

Mr. Butcher: Your Honor, I didn't know it. I bring it only for the point of the record.

Mr. Grigsby: Mr. Butcher appears for Sylvia Henderson and when this amended complaint was served——

The Court: Very disappointing to have this point raised [191] at all. Does counsel care to go forward with arguments at this time?

Mr. McCarrey: I should like to have it continued until two o'clock this afternoon.

The Court: Very well, Court will hear Mr. Grigsby.

Mr. Butcher: Your Honor, may I inquire at this time as to the procedure now in arguments. With so many attorneys involved will all attorneys argue it or will some specific few argue it and what relationships?

The Court: All attorneys will have an opportunity to argue their own particular claims and also within limits the general issues. However, I hope that attorneys will avoid all repetition in presenting the law involved and if counsel for defendants desires to have an opportunity to answer each attorney upon the specific claims presented he may do so.

Mr. McCarrey: Your Honor, I would like to waive reporting as far as argument is concerned.

Mr. Grigsby: I think perhaps the stenographer had better be here in case.

The Court: The arguments will be recorded.

(Whereupon argument by counsel was had.)

(Upon motion of Mr. Kay the Court authorized taking of further testimony on behalf of the claim of Ketchikan Spruce and stated that following the argument he would hear further testimony of Harry Goudchaux and testimony of Lyle Anderson.) [192]

LYLE ANDERSON

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect-Examination

By Mr. Kay:

Q. Would you state your name, please?

A. Lyle Anderson.

Q. Are you the same Lyle Anderson who has previously testified and been sworn in this case?

A. I am.

Q. And you are still under oath in this matter?

A. I am.

Q. Mr. Anderson, in the claim of lien filed by the Ketchikan Spruce Mills, Inc. the lien reads that the name of the owners or reputed owners of said property is Audrey Cutting, Russell Smith and Sylvia A. Henderson, will you state what, if anything, you know concerning the inclusion of Sylvia A. Henderson's name in this claim of lien?

A. I am sorry, I know nothing of it whatsoever. I was out of the town at the time the lien was filed and I never heard of the name until this Court said it during the course of this trial.

Q. During the time that Ketchikan Spruce Mills was supplying material to this Cutting job, did you have any knowledge of [193] any interest owned or claimed by Sylvia Henderson in lot 2, block 37-D in South Addition?

A. None whatsoever.

Mr. Kay: That is all.

(Testimony of Lyle Anderson.)

The Court: Who verified the claim?

Mr. Kay: Harry Goudchaux.

The Court: Very well, counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Anderson, when you filed the claim you did have some information, did you not, about who the owners were?

A. Well, as I stated, I was out of town at the time that was filed. Now, if I might outline our procedure in filing these?

Q. Yes, go right ahead.

A. When we file a lien we take the amount of it and the name and turn those over to our firm of attorneys with any other information that we might have regarding that and the liens are made out there and we sign them and the liens are filed. In this particular instance I didn't sign it nor did I ever have anything to do with it. It was done by Mr. Goudchaux.

Q. Did you turn over the information yourself to your attorneys? A. On this one, no.

Q. Where did they get it?

A. Mr. Goudchaux turned it over to them.

Q. They got it from Mr. Goudchaux? [194]

A. Yes.

Q. You know that from what you learned since you came back?

(Testimony of Lyle Anderson.)

A. I left instructions before I left town that there was to be a lien filed and Mr. Goudchaux would take care of it.

Q. And did you make any effort yourself to determine who the owner of the property was?

A. Well, at the time, as per my previous testimony, when I called Mrs. Cutting on the 'phone I stated to her that we would charge the material to her and there was no denial of ownership or repsonsibility at that time.

Q. But you didn't actually discuss the ownership of the property, did you?

A. I am sorry, I didn't.

Q. You didn't? And you made no other effort to find out who was the owner of the property?

A. No.

Q. No effort? A. No, no occasion to.

Q. You just assumed that Audrey Cutting was the owner? A. That is right.

Q. You never heard the name, Sylvia Henderson, until you came into Court?

A. That is right.

Mr. Butcher: That is all.

The Court: That is all.

(Witness excused.) [195]

Mr. Kay: Harry Goudchaux.

HARRY GOUDCHAUX

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect-Examination

By Mr. Kay:

Q. Will you state your name, please?

A. Harry Goudchaux.

Q. Are the same Hary Goudchaux who has previously been sworn and testified in this case?

A. I am.

Q. You realize you are still under oath?

A. Absolutely.

Q. Mr. Goudchaux, in the notice of lien filed by the Ketchikan Spruce Mills, Inc. the names of the owners or reputed owners of the property in this case are given as Audrey Cutting, Russell Smith and Sylvia A. Henderson, that notice being signed by you on the 19th day of July, 1948, would you state what, if anything, Mr. Goudchaux, you know regarding Sylvia A. Henderson and her inclusion in this notice?

A. I recall talking to either Mr. Baker at the First National or Mr. Johnson at the Bank of Alaska and they told me that Mrs. Cutting was applying for a loan and the name of her daughter, Sylvia Henderson, was in there and——

Mr. McCarrey: Will you talk in the microphone, please? [196]

A. At the time I got ready to file the lien I

(Testimony of Harry Goudchaux.)

talked to either Mr. Baker at the First National or Mr. Johnson at the Bank of Alaska. They told me Mrs. Cutting was applying for a loan and Sylvia Henderson was mentioned as one of the owners of the property, possibly her daughter. No mention was made to me as to her age or anything that would make me believe that she was a minor.

Q. (By Mr. Kay): And, Mr. Goudchaux, did you supply the information to our office from which this claimant lien was written?

A. I gave them the information and I believe I gave it to Mr. Dan Cuddy at the time and suggested that he check on that.

Q. And Mr. Dan Cuddy is a clerk in the office of Cuddy and Kay? A. That is right.

Q. And do you know anything else concerning the name of Sylvia Henderson being included in your claim of lien?

A. That is the only reason, I imagine, for it being included.

Q. Let me ask you whether or not you knew anything or not about Sylvia Henderson claiming an interest in lot 2, block 37-D, South Addition, City of Anchorage, during the time you were supplying materials to this Cutting job.

Mr. Butcher: Objected to as leading.

The Court: Overruled. You may answer.

The Witness: The first knowledge I had of Sylvia Henderson [197] entering into the picture at all was about a day before I filed the lien.

(Testimony of Harry Goudchaux.)

Mr. Kay: That is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. I believe you testified previously, Harry, that you were the bookkeeper for the company?

A. That is right.

Q. You have been there quite a while?

A. That is right.

Q. And you deal with these contractors all the time, do you not? A. Absolutely.

Q. In ordering material, and you take such precautions as you normally do in good business procedure to protect your credits?

A. That is right.

Q. When Russell Smith applied for credit did you inquire from him as to who the materials were for—what job it was?

A. He came in, if I remember correctly, and said that he was going to build a house for Mrs. Audrey Cutting, if I am not mistaken. I told him “Well, Russell, we cannot handle it for you.”

Q. You meant you couldn't extend credit? [198]

A. Could not extend him credit.

Q. And Mrs. Cutting's credit was satisfactory as far as you were concerned?

A. Mrs. Cutting had had an account with us and it had been fairly satisfactory.

Q. Did you make any efforts then, Harry, to

(Testimony of Harry Goudchaux.)

determine whether Mrs. Cutting owned the property or not? A. I didn't at the time.

Q. You didn't at the time? A. No.

Q. When did you make an effort?

A. Just before we filed the lien. Mr. Anderson had talked to Mrs. Cutting and he told me it was okeh to deliver the lumber.

Q. And as far as you, yourself, was concerned you just assumed that it was Mrs. Cutting's property? A. That is right.

Q. And you absolutely made no effort to find out who was the owner? A. No.

Mr. Butcher: That is all.

The Court: That is all.

(Witness excused.)

The Court: Any other testimony?

(No response.)

The Court: Any other testimony in connection with this [199] subject to be offered on behalf of the defendant?

Mr. Butcher: No, Your Honor.

The Court: Is there anything further to be presented to the Court in connection with this case?

Mr. Butcher: Your Honor, I was going to inquire if Your Honor has a copy of the stipulations entered into by counsel at the commencement of the trial. I notice we have a different stenographer and there were stipulations made on the part of most of counsel that they were not seeking personal

judgments against Mrs. Cutting and believing that we would have the same stenographer throughout the trial I made no notation of it and I am wondering now if the Court has the stipulation as to those attorneys seeking personal judgment and those attorneys not for their clients.

The Court: No, I do not recall any written stipulations. The stipulations, as I recall it, were all oral. I think I remember them. As I recall the only two seeking personal judgment were Ketchikan Spruce Mills, Anchorage Sand & Gravel Company and the Concrete Products Company,—Cinder Blocks Products Company—those are the only three that I can recall that asserted any personal claim against Mrs. Cutting.

Mr. Butcher: That was my recollection, too, Your Honor. However, in the course of Mr. Stringer's argument he mentioned the fact that she was personally liable under the contract and I am wondering whether he entered into that stipulation or not. [200]

The Court: I have forgotten. I assume that he would claim a personal judgment against Mrs. Cutting for the amount.

Mr. Butcher: I am wondering, Your Honor, if Mr. Stringer entered into the stipulation. I don't remember.

Mr. Stringer: No, I did not.

The Court: The Court will have to decide that upon the evidence, then.

Mr. Butcher: I wonder if it is possible to get

a copy of the stenographer's record of the stipulation?

The Court: On the question of lien, I have no doubt that the stenographer will be glad to furnish a copy.

Mr. Kay: Your Honor, at this time I would like to renew the motion which I previously made which Your Honor took under advisement or delay for sometime to—I think I would like to make a general motion that my pleading be amended to conform with the proof.

The Court: In what respects? After all, that is too general.

Mr. Kay: In the following respect, that the notice of lien filed by the Ketchikan Spruce Mills, Inc. be amended to include the name of Ralph Russell Thomas as an owner or reputed owner of said property and that paragraph 6 of the—paragraphs 4 and paragraph 6 of each of the two causes of action or each of the two counts, first causes of action in my complaint, be [201] amended to include the name of Ralph Russell Thomas.

The Court: Is there objection?

Mr. Butcher: Yes, Your Honor, I object.

The Court: Objection is overruled and the complaint may be amended on the lien and the claim of lien and the complaints may be amended accordingly.

Mr. Butcher: And may an exception be shown?

The Court: Exception may be noted.

Is there anything further to be presented in connection with this case?

(No response.)

The Court: The decision will necessarily be reserved for a short time. I realize the desirability of having the case determined without any considerable delay and I thank counsel for the thought and study that they have given to the questions of law involved and for their able presentation.

There being nothing further we will adjourn until 10 o'clock in the morning.

(Whereupon, at 3:30 p.m., Wednesday, February 16, 1949, the hearing was closed.) [202]

Certificate

United States of America,
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing 202 pages to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

/s/ OREN J. CASEY,

Certified Shorthand Reporter.

Dated at Anchorage, Alaska, this 16th day of July, 1949.

[Endorsed]: No. 12324. United States Court of Appeals for the Ninth Circuit. Audrey Cutting and Sylvia A. Henderson, Appellant. vs. Ray Bullerdick, et al, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed August 8, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of District Court and Causes.]

No. A-5087 and A-5088, Consolidated.

DESIGNATION OF POINTS

The defendants assign the following as the errors of the trial court on which they propose to rely in the above appeal.

I.

That the trial court erred in denying the motion of counsel for defendants to dismiss at the close of the plaintiffs' case on the grounds that the complaints of the original plaintiffs and plaintiffs intervenor did not state good causes of action against the defendants.

II.

That the trial court erred in denying the motion of defendants counsel to strike the lien claims filed by plaintiffs and to dismiss at the close of

plaintiff's case on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

III.

That the trial court erred in denying the motions of defendants counsel to dismiss against the defendant, Audrey Cutting, on the grounds that she was neither owner of the property nor agent of the true owner, Sylvia A. Henderson.

IV.

That the trial court erred in amending sua sponte and by judgment the pleadings of plaintiffs to contain essential allegations not previously set forth therein.

V.

That the trial court erred in amending the plaintiffs pleadings sua sponte and by judgment to include defendant Sylvia A. Henderson as a party defendant.

VI.

That the trial court erred in amending sua sponte and by judgment the complaints of plaintiffs sufficient to make good causes of action.

VII.

That the trial court erred in refusing to follow the case of *Russell vs. Hayner*, 130 Federal Reporter p. 90, as to the essential allegations of complaints and lien claims in lien foreclosure suits.

VIII.

That the trial court erred in allowing the lien claims against the real property of an infant, the said Sylvia A. Henderson.

IX.

That the trial court erred in ordering sold by its Judgment the real property of Sylvia A. Henderson, a minor.

X.

That the trial court erred in rendering personal judgment against the defendant, Audrey Cutting, who was neither owner nor agent of the owner of the said real property.

XI.

That the trial court erred in rendering judgment against the real property of Sylvia A. Henderson, when the said Sylvia A. Henderson had not been served personally nor constructively with summons in accordance with the laws of Alaska.

XII.

That the trial court erred in denying the motion to dismiss against Sylvia A. Henderson, at the close of the trial, on the grounds that she was not made a party to the action by personal or constructive service of summons, and as an infant was not before the court through a general guardian or guardian ad litem.

XIII.

That the trial court erred in appointing Audrey Cutting guardian ad litem at the close of the trial by its order nunc pro tunc.

XIV.

That the trial court erred in finding against the evidence, that there was no delivery of the deed of the real property from Ralph Thomas to Sylvia A. Henderson.

XV.

That the trial court erred in finding against the evidence, that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas of said real property.

XVI.

That the court erred in permitting plaintiffs, Ketchikan Spruce Co. to support their case by presenting additional testimony after both plaintiff and defendant had rested, and subsequent to the motion of defendant counsel to dismiss on the grounds of failure to make a prima facia case.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Certified Copy.

Receipt of copy acknowledged.

[Endorsed]: Filed D. C. Territory of Alaska,
August 20, 1949.

[Endorsed]: Filed U.S.C.A., Aug. 29, 1949.

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDERSON,

Appellants,

vs.

RAY BULLERDICK, et al.,

Appellees.

SUPPLEMENTAL
Transcript of Record
(Pages 579 to 594)

FILED

OCT - 1 1950

Appeal from the District Court for the
Territory of Alaska,
Third Division

PAUL P. O'BRIEN,
CLERK

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDERSON,

Appellants,

vs.

RAY BULLERDICK, et al.,

Appellees.

SUPPLEMENTAL
Transcript of Record
(Pages 579 to 594)

Appeal from the District Court for the
Territory of Alaska,
Third Division

In the United States Court of Appeals for the
Ninth Circuit
No. 12324

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellants,

vs.

RAY BULLERDICK et al,

Appellees.

STIPULATION

It is hereby stipulated by and between the appellants, represented by Harold J. Butcher, attorney at law, and the appellees, represented by George B. Grigsby, attorney at law, that the oral opinion of the trial court in the above captioned case which is included in the typewritten draft of the Transcript of Trial Proceedings on file in the Clerk's office of the U. S. Court of Appeals for the Ninth Circuit, commencing with page 3 and ending with page 10 of Volume II and bound at the back of said volume and which is unauthenticated by the reporter who authenticated the rest of the Trial Proceedings, is a true record of the Court's oral opinion.

This Stipulation is made for the purpose of including said oral opinion in the Supplemental Record for which request has been made to have printed, together with copies of the summons and returns showing service upon Ralph R. Thomas and Audrey Cutting.

/s/ HAROLD J. BUTCHER,

/s/ GEORGE B. GRIGSBY.

[Endorsed]: Filed U.S.C.A. November 4, 1950.

Court Room,
Federal Building,
Anchorage, Alaska,
Friday, March 4, 1949.

Before: The Honorable Anthony J. Dimond,
United States District Judge.

Appearances:

GEORGE B. GRIGSBY,

Attorney at Law, Anchorage, Alaska,
appearing for Ray Bullerdick, et al.,
plaintiffs in Cause No. A-5087, Ted Van
Thiel, et al., copartners as Brady's Floor
covering; E. V. Fritts, et al., copartners
as Alaska Paint and Glass Company;
and City Electric of Anchorage, Inc., a
corporation, plaintiffs in cause No.
A-5088 and the intervenors, Ted Van
Thiel, et al., copartners as Kennedy
Hardware.

J. L. McCARREY, JR.,

Attorney at Law, Anchorage, Alaska, ap-
pearing for intervenors, Arthur F. Wal-
dron, et al., copartners as Anchorage
Sand and Gravel Company.

WENDELL P. KAY,

Attorney at Law, Anchorage, Alaska, ap-
pearing for intervenors, Ketchikan
Spruce Mills, Inc., a corporation, and
Alaskan Plumbing and Heating Com-
pany, Inc., a corporation.

HERALD E. STRINGER,

Attorney at Law, Anchorage, Alaska, appearing in the capacity of intervenor as Trustee for the Estate of Russell W. Smith, Bankrupt.

EDWARD V. DAVIS and

PAUL F. ROBISON,

Attorneys at Law, Anchorage, Alaska, appearing for intervenors, Ken Hinchey and Nadine Hinchey, co-partners, as Ken Hinchey Company; intervenors, Ray Wolfe, Esther Wolfe, et al, copartners as Wolfe Hardware and Furniture.

HAROLD J. BUTCHER,

Attorney at Law, Anchorage, Alaska, appearing for the defendants, Audrey Cutting, and Sylvia A. Henderson, a minor.

(No appearance was made by the defendant Ralph R. Thomas in person or by attorney.)

(Whereupon, at 10 o'clock, a.m., Friday, March 4, 1949, the above-entitled matter came on for decision and rendering of judgment.)

PROCEEDINGS

The Court: In causes No. 5087 and 5088, the first one being Ray Bullerdick and others against Ralph R. Thomas and others; and the second being Ted Van Thiel and others against Ralph R. Thomas

and others, which were consolidated for trial, I find generally in favor of the plaintiffs and the intervenors who have submitted claims of lien upon the property for labor performed or material furnished in the construction of a dwelling house on the property.

Question was raised as to the validity of the liens. I find that each and all of the liens are valid because they sufficiently comply with the law in our statutes upon the subject governing the matters which must be stated in the lien claims.

All of the lien claims were filed in time. In fact, there is no dispute, I think, upon that question. Question was also raised as to the sufficiency of the pleadings. The pleadings filed on behalf of the original plaintiffs are in all respects adequate. The other pleadings filed on behalf of certain intervenors may be considered as amended to conform with the proof.

Those amendments so far as the intervenors' pleadings are concerned are to the effect that the work done and materials supplied were done and supplied at the instance of the then owner and record owner, Ralph R. Thomas. That averment or one equivalent to it is contained in the original complaints in each action, and it will be considered that any of the defendants may have denied that averment.

I do not know why it should be necessary to plead anything that the law says exists. The law says that work done under such circumstances shall be considered to be done—shall be deemed to be done—

and materials furnished shall be deemed to be furnished at the instance of the owner.

Yet our own Circuit Court of Appeals in the case of Haines against Russell evidently held that it was necessary to plead what the law itself provides to be the fact. That decision, it is true, was rendered in 1904. But as far as I know it has never been overruled.

Therefore, I follow it to the extent of saying that the pleadings may be considered amended to contain such averment.

Some of the pleadings fail to refer to the claim of the defendant, Sylvia Henderson. Those pleadings under the proof may be considered as amended by stating in substance that the defendant, Sylvia Henderson, claims some title or interest in the property adverse to the plaintiffs and intervenors but that such claim and title is subordinate to the claims of plaintiffs and intervenors and it shall be considered that any part of the pleadings adverse to the claim of the defendant, Sylvia Henderson, or any other defendant is denied.

Question has arisen here as to the date of the delivery of the deed executed by the defendant, Ralph R. Thomas, to the defendant, Sylvia Henderson. In my opinion, the deed was not delivered at the time it was executed and it was only delivered when it was released from the bank shortly before the fourth of August if not on the fourth of August. While no particular point was made of it, there is at least grave doubt as to whether Sylvia Henderson ever executed any mortgage in favor of Ralph

R. Thomas. The original mortgage was not produced in court. It was never recorded.

All that was produced in court was what a witness claimed to be a copy of it.

It seems to me that if the mortgage had actually been executed it would have been produced because the defendant, Audrey Cutting, produced in court the note to secure the payment of which the mortgage was given.

It is almost incomprehensible to believe that all of these papers would have been placed in escrow under the circumstances. It would have been certainly much more appropriate to have the deed delivered at the time of execution and the mortgage delivered, and both recorded.

Now I hold in favor of the plaintiffs upon another ground and that is because the deed from Thomas to the defendant, Sylvia Henderson, a minor, was not recorded until August 4, 1948, long after all of the work was done and the materials supplied.

I further find that none of the plaintiffs or intervenors claiming liens had any actual notice of the deed to Sylvia Henderson until after the work was done and the materials supplied. Under our law an unrecorded instrument of this kind cannot affect the liens of people who have in good faith given labor and furnished materials for the construction of a building. In act, everything that went into that building, the building as it now stands is the result and the result only of the labor and materials of these lienholders and to deny them their liens because an unrecorded deed was held by a minor, a

minor nevertheless of the age of discretion, would be certainly not in harmony with justice and would be, in my judgment, an outrage upon justice.

It is true as a matter of law that if the deed had been recorded when it was executed then the lien claimants would have had constructive notice of it. And if they did not have actual notice it would not have made any difference, their liens would have failed as against Sylvia Henderson's claim. But there was neither actual or constructive notice on the part of the lien claimants and therefore their liens are in every respect superior to the claim of title of Sylvia Henderson.

Another issue was that of posting notices on the ground. The notices as posted would have been effective only to give actual notice of the claim of Sylvia Henderson. So far as Andrey Cutting was concerned, although she held herself out to be the owner, had contracted as the owner, she now says she had no interest in it and had no interest in it at that time. So any posting of notices on her part would have been futile under the doctrine laid down by the Court of Appeals for the Ninth Circuit in the case of *Artic Lumber Company* against *Borden*, reported in 211 *Pacific* at page 50.

Neither could the defendant, Thomas, claim anything by reason of the posting of the notices, although he did not post any notices.

Moreover, I find that the notices were not posted within three days of the commencement of the work on the property. There was detailed discussion about that—detailed testimony—as to whether the notices

were posted. But they weren't posted at the time claimed and they weren't posted, if posted at all, until long after the work was commenced. In my judgment there was no notice posted on the outside of the property at all.

The sum and substance of the testimony is that no notice was posted except possibly one in the basement. I arrive at the conclusion that one may have been posted in the basement only because another witness found a copy of the notice, which was introduced in evidence, in the basement after he moved in as a tenant of the building.

I think there is no other issue that requires discussion except the matter of attorneys fees. For the plaintiffs in the action, an attorney fee—in the Bullerdick action—an attorney fee of \$750.00 is allowed.

For the plaintiffs in 5088, Brady's Floor Covering and others, an attorney's fee of \$350.00 is allowed.

For Ketchikan Spruce Mills and Alaskan Plumbing & Heating Company, an attorney fee of \$700.00 is allowed.

For Anchorage Sand and Gravel Company and Cinder Concrete Products Company, an attorney's fee of \$300.00 is allowed.

For Wolfe Hardware and Ken Hinchey an attorney's fee of \$300.00 is allowed.

For the Referee in Bankruptcy of the bankrupt estate of the defendant, Smith, an attorney fee of \$500.00 is allowed. Incidentally, the defendant, Smith's, claim—lien claim—is valid to the extent

of \$10,000.00 and no more, but it is subject and subordinate to the other claims of liens and therefore I suppose it is absolutely valueless.

There was convincing testimony to the effect that Ketchikan Spruce Mills and Anchorage Sand and Gravel Company, who have claims in the respective amounts of \$2,717.86 and \$1,685.00, did not advance credit to the defendant, Smith, but did advance credit to the defendant, Cutting. That testimony, in my judgment, is true. There is not even a reasonable doubt about it.

Therefore, these two intervenors in addition to have claims of lien on the building are entitled to personal judgments against the defendant, Audrey Cutting, in the amounts named.

I hope that counsel for the plaintiffs and intervenors will join in drawing one set of finds of fact and conclusions of law and judgment. I think that is the only practical way to handle it.

Mr. Grigsby: If Your Honor please, Your Honor has made no statement with regard to priorities of the various lien claims.

The Court: As far as I know, all of the liens are of equal rank.

Mr. Grigsby: I ask if Your Honor has considered the provision in the Compiled Laws of 1933 under the heading "Liens" entitled "Provisions common to all liens"?—

The Court: I have read that.

Mr. Grigsby: —in which labor is given a priority over materials? I just call Your Honor's attention to that.

The Court: I am glad counsel brought it up. I shall go into it and give an opinion upon that later. I ask counsel to go back to the genesis of that Act however. I think it was passed in 1919, and although the provisions are listed in the Compiled Laws as being applicable to all liens, it has been urged in this Court heretofore that by reason of the facts that the Act as drawn did not refer to mechanics liens that mechanics liens are not included in it.

I hope Counsel, all of Counsel, will go into that and I shall make a further examination and give a decision upon that point later.

Mr. Grigsby: May we have a copy of the memoranda?

The Court: I have nothing here.

Mr. Grigsby: The only thing, I didn't get all of it. I suppose each counsel took his own?

The Court: I will prepare a memorandum with sufficient copies to give a copy to each of counsel.

Anything further to come before the Court in connection with this matter?

(No response.)

(Whereupon, at 10:10 o'clock, a.m., Friday, March 4, 1949, the giving of decision and rendering of judgment was concluded.)

In the District Court of the United States for the
Territory of Alaska, Third Division

No. A-5087

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKIN, LEE RUNKLE, ARDEN BELL
and WILLIAM BESSER,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

SUMMONS

The President of the United States of America,
Greeting:

To the Above-Named Defendant:

You Are Hereby Required to appear in the District Court for the Territory of Alaska, Third Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiffs will take judgment against you for want thereof and will apply to the Court for the relief demanded in said complaint.

Witness, the Hon. Anthony J. Dimond, Judge of said Court, this 24th day of July in the year of our Lord one thousand nine hundred and forty-eight.

M. E. S. BRUNELLE,
Clerk.

[Court Seal] By VIRGINIA OLSON,
Deputy Clerk.

United States Marshal's Office,
Territory of Alaska, Third Division.

I Hereby Certify, that I received the within writ on the 4th day of August, 1948, and personally served the same on the 4th day of August, 1948, by delivery to and leaving with Ralph R. Thomas, one of the said defendants named therein personally, at Anchorage, Alaska, in said Division of said Territory, a copy thereof, together with a copy of the complaint, certified to by, attached thereto.

Dated at Anchorage, Alaska, the 4th day of August, 1948.

JAMES H. PATTERSON,
U. S. Marshal.

By /s/ W. B. HEALY,
Deputy.

A true copy.

[Endorsed]: Filed, District Court, Territory of Alaska, August 4, 1949.

In the District Court of the United States for the
Territory of Alaska, Third Division

No. A-5088

TED VAN THIEL, PATSY VAN THIEL, E. P.
CARTEE, JEAN CARTEE, R. C. REEVE,
and JANICE REEVE, co-partners under the
firm name and style of KENNEDY HARD-
WARE, and GENE BRADY, Co-partners
under the firm name and style of Brady's Floor
Covering, and E. V. FRITTS, WILLIAM J.
WALLACE, and EINER G. NELSON, Co-
partners under the firm name and style of
ALASKA PAINT AND GLASS CO., and
CITY ELECTRIC OF ANCHORAGE, INC.,
a Corporation,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

SUMMONS

The President of the United States of America,
Greetings:

To the Above-Named Defendants:

You Are Hereby Required to appear in the Dis-
trict Court for the Territory of Alaska, Third Di-
vision, within thirty days after the date of service
of this summons upon you, and answer the com-
plaint of the above-named plaintiffs, a copy of which
complaint is herewith delivered to you; and unless

you so appear and answer, the plaintiffs will take judgment against you for want thereof, and will apply to the Court for the relief demanded in said complaint.

Witness, the Hon. Anthony J. Dimond, Judge of said Court, this 24th day of July, in the year of our Lord one thousand nine hundred and forty-eight.

M. E. S. BRUNELLE,
[Court Seal] Clerk.

By /s/ VIRGINIA OLSON,
Deputy Clerk.

United States Marshal's Office,
Territory of Alaska, Third Division:

I hereby certify that I received the within writ, a summons, on the 4th day of August 1948, and personally served the same on the 4th day of August 1948, by delivering to and leaving with Ralph R. Thomas, one of the said defendants named therein personally, at Anchorage, Alaska, in said division of said Territory, a copy thereof, together with a copy of the complaint, certified to by George B. Grigsby, attorney, attached thereto.

Dated at Anchorage, Alaska, the 4th day of August, 1948.

JAMES H. PATTERSON,
United States Marshal.

By /s/ W. B. HEALY,
Deputy.

A true copy.

[Endorsed]: Filed District Court, Territory of Alaska, August 4, 1948.

In the United States District Court for the Territory of Alaska, Third Division at Anchorage

Nos. A-5087—A-5088

RAY BULLERDICK, et al.,

Original Plaintiffs.

TED VAN THIEL, et al.,

Original Plaintiffs.

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Original Defendants.

ARTHUR F. WALDRON, et al.,

Plaintiffs in Intervention.

vs.

SYLVIA A. HENDERSON,

Defendant in Intervention.

SUPPLEMENTAL DESIGNATION OF RECORD

For the purpose of printing a Supplemental Record on Appeal in the above entitled case, appellant designates for inclusion in a Supplemental Transcript of the Record the summons issued for service on Ralph R. Thomas and the summons issued for service on Audrey Cutting, together with the Marshal's return of service on the above sum-

mons, and this Supplemental Designation of Record.

/s/ HAROLD J. BUTCHER,
Attorney for Appellant.

A true copy.

[Endorsed]: Filed District Court, Territory of Alaska, November 1, 1950.

[Endorsed]: No. 12324. United States Court of Appeals for the Ninth Circuit. Audrey Cutting and Sylvia A. Henderson, Appellants, vs. Ray Bullerdick, et al, Appellee. Supplemental Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed November 6, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUDREY CUTTING and
SYLVIA A. HENDERSON

Appellants

vs.

RAY BULLERDICK, et al.

Appellees

No. 12324

BRIEF FOR APPELLANTS

HAROLD J. BUTCHER
Attorney for Appellants
Anchorage, Alaska

FILED

OCT - 6 1950

PAUL P. O'BRIEN,
CLERK

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUDREY CUTTING and
SYLVIA A. HENDERSON

Appellants

vs.

RAY BULLERDICK, et al,

Appellees

No. 12324

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a Decree of Judgment rendered by the District Court for the Territory of Alaska, a Court of general jurisdiction. The Decree of Judgment grants a foreclosure against the real property of the appellant Sylvia A. Henderson, as authorized by Section 26-9-3, Compiled Laws of Alaska, 1949, and other sections of Chapter Nine, Title Twenty-Six. This Court has jurisdiction under the provisions of Title Twenty-Eight, U. S. C. A. Section 1291 and 1294.

STATEMENT OF FACTS

The appellant, Audrey Cutting, a resident of the City of Anchorage in the Territory of Alaska, the mother of appellant Sylvia A. Henderson, a minor, on or about the 30th day of November, 1946, purchased, with funds paid to her by her former husband, the

father of Sylvia Henderson, from one Ralph R. Thomas of Anchorage, for and on behalf of her minor daughter, Sylvia Henderson, a building lot in Anchorage, which lot is more particularly described in defendant's exhibit No. 101, a Warranty Deed set forth in full on page 343 of the Transcript of Record, by which Ralph Thomas conveyed the lot to Sylvia A. Henderson. At the time of the execution and delivery of the Deed to Sylvia A. Henderson, the vendor took back from the said Sylvia Henderson, a mortgage (TR 415) as security for payment of the purchase price, together with a note (TR 419) providing for installment payments. However, inadvertently or otherwise, these papers, including the Warranty Deed, Mortgage, and Note were not recorded with the United States Commissioner and Ex-Officio Recorder of Deeds for the Anchorage Precinct, but were placed with the Union Bank of Anchorage, and that no recording of the instruments occurred until the 4th day of August, 1948, when the Warranty Deed, conveying the property from Ralph R. Thomas to Sylvia A. Henderson was filed for recording.

Meanwhile, and on or about the 30th day of April, 1948, Audrey Cutting entered into a contract with one Russell Smith, a local building contractor and intervenor in the trial of this case through his trustee in bankruptcy, Herald Stringer, which contract was introduced into evidence as Russell Smith's Exhibit No. 1 (TR 256, line 27) and certain paragraphs of which, for the purposes of this Statement of Fact, are set forth, as follows:

INDEPENDENT CONTRACTOR'S AGREEMENT

THIS AGREEMENT, made this 30th day of April, 1948, by and between RUSSELL W. SMITH, an independent contractor doing business in the City of Anchorage, Alaska, hereinafter called the "Contractor," and AUDREY CUTTING, a married woman, of Anchorage, Alaska, hereinafter called the "Owner," WITNESSETH:

That, Whereas, the Owner is the owner of Lot Two (2) in Block Thirty-seven "D" (37-D) of the South Addition to the original townsite of Anchorage, Alaska, and is desirous of having constructed thereon a one-story dwelling house with full basement; and

WHEREAS, the Contractor has agreed to construct said house, within the time and at the price stated herein, and according to the specifications as hereinafter set forth:

NOW, THEREFORE, the parties hereto do hereby agree as follows:

That the Contractor will construct said house, according to the plans and blueprints furnished by the Owner, which said plans have heretofore been agreed upon, and will perform all the work entailed in a workmanship like manner to the satisfaction of the Owner. The specifications shall be as follows:

Dimensions: (Paragraph Deleted)

Excavations: (Paragraph Deleted)

Basement: (Paragraph Deleted)

Floors: (Paragraph Deleted)

Sidewalls, Ceilings and Partitions: (Paragraph Deleted)

Roof: (Paragraph Deleted)

Outside Siding: (Paragraph Deleted)

Wiring: (Paragraph Deleted)

Insulation: (Paragraph Deleted)

Plumbing: (Paragraph Deleted)

Cabinet Work: (Paragraph Deleted)

Woodwork: (Paragraph Deleted)

Doors and Windows: (Paragraph Deleted)

Painting and Decorating: (Paragraph Deleted)

Miscellaneous: (Paragraph Deleted)

The Contractor agrees to complete this contract within 60 days after the commencement of the work, PROVIDED, however, that all materials are available; and PROVIDED FURTHER, that there is no delay on the part of the painters which may be beyond the control of the Contractor.

The Contractor further agrees that the work shall be in every respect at the risk of the Contractor until completed and accepted by the Owner, except as to damages or injuries caused directly by the Owner or the Owner's agents or employees; and the Contractor shall furnish the Owner, before commencement of the work, with proof of adequate insurance coverage, satisfactory to the Owner, covering Workmen's Compensation and Employer's Liability, and Contractor's Public Liability and/or Property Damage; and shall indemnify and save harmless the Owner from claims under the Workmen's Compensation Act and from

any other claim for damages for personal injury, including death to any employee, or other person, or injury to property, that may arise, or may be alleged to arise, in any manner from the carrying out of this contract whether by the Contractor or by any subcontractor, or by any one employed by either of them.

The Contractor further provides and agrees to give the proper authorities all requisite notice relating to the work, and to obtain all official permits and licenses required for the prosecution of any of the work embraced in this contract, and to abide by all the laws, ordinances, regulations and other rules, federal, territorial or municipal, applicable thereto.

The Contractor shall promptly pay for all materials, supplies and all labor employed by him in the work, to the end that the property may be kept free from materialmen's and mechanic's liens, and shall promptly discharge such liens, if any.

The Contractor shall give personal attention to the faithful prosecution and completion of the work, and shall be present either in person or by a competent and duly authorized representative on the site of the work continually during its progress.

The Owner shall pay the Contractor in full at the completion of this contract upon the Contractor's turning the said house over to the Owner, and the full price for the Contractor's services, including all materials and labor furnished in the performance of this contract, shall be the sum of NINE THOUSAND EIGHT HUNDRED DOLLARS (\$9,800.00).

Neither party to this contract shall assign this contract nor any interest therein, without the written consent of the other.

It is expressly agreed that this instrument contains the entire agreement between the parties, and that no statement, promise, or inducement made by any party hereto, or employee, agent or salesman of any part hereto, which is not contained in this written contract, shall be binding or valid; and this contract may not be enlarged, modified or altered except in writing signed by the parties and indorsed hereon.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 30th day of April, 1948.

Signed, sealed and
executed in the
presence of

(s) Margaret Kish
(s) J. L. McCarrey, Jr.

(s) Russell W. Smith (SEAL)
Contractor

(s) Audrey Cutting (SEAL)
Owner

ACKNOWLEDGEMENT

In this Contract the said Russell Smith described himself as an independent contractor and designated himself as the "Contractor" while Audrey Cutting designated herself as the "Owner."

Simultaneously with or immediately following the execution of the foregoing Contract, the Contractor commenced construction of the residence described in the Contract and arranged for the delivery of building materials from certain specified materialmen and

hired laborers who agreed to permit the Contractor to withhold payment for services and materials until completion of the job, at which time the said Audrey Cutting would be obligated to pay the contract price. The laborers had agreed to waive this right to weekly payment for services rendered upon the promise of the contractor to pay a bonus of ten cents per hour over and above the regular carpenter's contract rate. (TR 272, line 23).

Audrey Cutting, according to her testimony, posted notices of non-responsibility in and about the premises within five days of the commencement of the job, which claim on the part of Audrey Cutting is disputed by testimony of the plaintiffs, and intervenors, and the Court found that notices, if any, were not posted until some time after the five day period. Following commencement of the work, the house proceeded towards completion and that sometime near the end of June, the contractor delivered the keys to Audrey Cutting (TR 289, Line 20) and informed her that the work was completed but in the course of his testimony failed to fix the exact date that the contract was completed as revealed by his testimony appearing at TR 279-280, particularly lines 5 and 6 of Page 280, wherein the contractor testified in response to a question asked by counsel "would it have been June, July or August?" (meaning date of completion) to which the contractor replied, "I don't exactly recall but don't believe it was in June." The Contractor on this date alleged, requested that Audrey Cutting pay to him the sum of \$13,500.-

00 which was \$3,700.00 in excess of the price agreed to in the Contract and in excess of the price of the agreed extra work (construction of porch). The appellant insisting that the Contractor had agreed to construct the porch for approximately \$200.00 (TR 259, last paragraph) and the Contractor insisting that the price would be \$400.00, or more, (TR 284, Line 21), the total price demanded by the Contractor was at least in excess of \$3,000.00, over and above the contract price plus the extra. The appellant, Audrey Cutting, in addition to objecting to the demand of \$13,500.00, claimed that certain phases of the construction were incomplete and that as a result of the dispute as to excess costs and incompleted work between the appellant Audrey Cutting and the Contractor, Russell Smith, nothing was paid on the Contract at this time. The Contractor, by reason of his special agreement with the materialmen and laborers, had not paid for the material and labor as the job progressed and was unable to make payment at the time of the dispute. Meanwhile, the laborers and materialmen filed mechanic's liens against the property. Upon the filing of said liens, no further negotiations were had towards the settlement of the contract price and subsequently and on or about the 24th day of July, 1948, suit was commenced in the District Court by filing complaints on behalf of said laborers and materialmen and service was made upon the defendants Audrey Cutting and Ralph Thomas. Sylvia Henderson, however, who was attending school in Portland, Oregon, was not named in the

original complaints as a party defendant and was not served with a copy of the Summons or Complaint and was, at no time thereafter, served with process. Meanwhile, other materialmen intervened in the suit and following the filing of numerous complaints, complaints in intervention, answers and replies, the cause went to trial on the 8th day of February, 1949.

The liens were proved and admitted into evidence, testimony of witnesses was taken and documentary evidence introduced. During the course of the trial, it developed that Sylvia Henderson was a minor (TR 262, Lines 11 and 12, TR 487, Line 18) and that she had not been made a party defendant in the original complaints, and was only mentioned in complaints of certain intervenors by reference; that she had not been served with process; and that no guardian or guardian ad litem had been appointed to protect her title to the real property. At the close of the trial it was moved by defendants' counsel (TR 559, Lines 5 to TR 562, Line 9) that the case against Sylvia Henderson be dismissed because no guardian or guardian ad litem had been appointed as provided by law. Whereupon, the Court by its nunc pro tunc order and against objections, appointed Audrey Cutting guardian ad litem for Sylvia Henderson (TR 561, Lines 11-21).

Following argument, the case was taken under advisement and subsequently the Findings of Fact (TR 77) and the Judgment and Decree (TR 98) were signed and entered, and the Court thereupon issued

the Execution and Order of Sale of the real property of Sylvia Henderson. Whereupon, appellants took this appeal and filed their Bond accordingly.

DESIGNATION OF POINTS

The appellants assign the following as the errors of the trial court on which they propose to rely in this appeal.

I

That the trial court erred in denying the motion of counsel for defendants to dismiss at the close of the plaintiff's case on the grounds that the complaints of the original plaintiffs and plaintiffs intervenor did not state good causes of action against the defendants.

II

That the trial court erred in denying the motion of appellants counsel to strike the lien claims filed by plaintiffs and to dismiss at the close of plaintiff's case on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

III

That the trial court erred in denying the motions of appellants counsel to dismiss against the defendant, Audrey Cutting, on the grounds that she was neither owner of the property nor agent of the true owner, Sylvia A. Henderson.

IV

That the trial court erred in amending sua sponte and by judgment the pleadings of plaintiffs to con-

tain essential allegations not previously set forth therein.

V

That the trial court erred in amending the plaintiff's pleadings sua sponte and by judgment to include defendant Sylvia A. Henderson as a party defendant.

VI

That the trial court erred in amending sua sponte and by judgment the complaints of plaintiffs sufficient to make good causes of action.

VII

That the trial court erred in refusing to follow the case of Russell vs. Hayner 130 Federal Reporter p. 90, as to the essential allegations of complaints and lien claims in lien foreclosure suits.

VIII

That the trial court erred in allowing the lien claims against the real property of an infant, the said Sylvia A. Henderson.

IX

That the trial court erred in ordering sold by its Judgment the real property of Sylvia A. Henderson, a minor.

X

That the trial court erred in rendering personal judgment against the defendant, Audrey Cutting, who was neither owner nor agent of the owner of the said real property.

XI

That the trial court erred in rendering judgment

against the real property of Sylvia A. Henderson, when the said Sylvia A. Henderson had not been served personally or constructively with summons in accordance with the laws of Alaska.

XII

That the trial court erred in denying the motion to dismiss against Sylvia A. Henderson, at the close of the trial, on the grounds that she was not made a party of the action by personal or constructive service of summons, and as an infant was not before the court through a general guardian or guardian ad litem.

XIII

That the trial court erred in appointing Audrey Cutting guardian ad litem at the close of the trial by its order nunc pro tunc.

XIV

That the trial court erred in finding against the evidence, that there was no delivery of the deed of the real property from Ralph Thomas to Sylvia A. Henderson.

XV

That the trial court erred in finding against the evidence, that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas of said real property.

XVI

That the court erred in permitting plaintiffs, Ketchikan Spruce Co. to support their case by presenting additional testimony after both plaintiff and defendant had rested, and subsequent to the motion of defendant counsel to dismiss on the grounds of failure to make a prima facie case.

A FURTHER STATEMENT REGARDING POINTS RELIED ON

Following an examination of the Designation of Points, made a part of this Record and appearing commencing at TR 574, it has been determined that the arguments regarding certain of the points cited as error are similar to or identical to other points and involve the same citations of authority. Appellants will, therefore, incorporate wherever possible, the similar points and treat one or more points together as one point.

ARGUMENT

FIRST POINT RAISED: 1. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF COUNSEL FOR DEFENDANTS TO DISMISS AT THE CLOSE OF THE PLAINTIFF'S CASE ON THE GROUNDS THAT THE COMPLAINTS OF THE ORIGINAL PLAINTIFFS AND PLAINTIFF INTERVENORS DID NOT STATE GOOD CAUSES OF ACTION AGAINST THE DEFENDANTS.

The appellants rely on the case of Russell vs. Hayner 130 Fed. 90 as a standard for testing the Complaints of the plaintiffs as it pertains to liens and lien foreclosure suits in the Territory of Alaska. This was a case arising in the District Court of the United States for the Second Division of the District of Alaska, in which the trial court sustained a demurrer to a complaint filed by one Russell upon the grounds that the

plaintiff's lien claim was defective and that the complaint filed did not state facts sufficient to constitute a cause of action. The plaintiff, having elected to stand on his complaint, the Court ordered the suit to be dismissed whereupon defendants took judgment for their costs and from that judgment, an appeal was taken to the Court of Appeals for the Ninth Circuit. Following an examination of the complaint and the Alaska Law applicable to liens and lien foreclosure proceedings, the Court affirmed the ruling of the trial court and set forth as a part of its ruling, the essential requirements for stating a good cause of action for lien foreclosure under the Alaska Law and defined also the essential requirements of a mechanic's lien under said law.

An examination of the two original complaints, No. A-5087 (TR 3) and No. A-5088 (TR 117), reveals that the complaints do not meet the requirements as set forth in Russell vs. Hayner and by applying those necessary requirements of good causes of action to the plaintiff's complaint, we find that said complaints are fatally defective on the same grounds that the appeal court found the complaint of Russell fatally defective. The two foregoing Complaints did not state that the true owner was unknown and that the reputed owner was (the name of the reputed owner) and did not allege that the work or labor was done at the instance of the owner of the building or his agent.

SECOND POINT RAISED: 2. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF DEFENDANTS COUNSEL TO STRIKE THE LIEN CLAIMS FILED BY PLAINTIFFS AND TO DISMISS AT THE CLOSE OF PLAINTIFF'S CASE ON THE GROUNDS THAT THE LIEN CLAIMS DID NOT CONTAIN SUFFICIENT FACTS TO CONSTITUTE VALID LIENS AGAINST THE REAL PROPERTY OF SYLVIA A. HENDERSON.

In support of appellants contention that the Court erred in refusing to strike the lien claims filed by plaintiffs on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson, we again refer to the case of Russell vs. Hayner *supra*. Herein the essential requirements of mechanic's liens, by virtue of the Alaska mechanic's lien law, has been established and we quote from the case as follows:

"A mechanic's lien is purely of statutory creation, and can only be maintained by a substantial observance and compliance with the provisions of the statute. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of the lien is indispensable."

We quote further from the Russell case as follows:

"The mere fact that appellants built the structure at the instance of Hayner, who was in possession of the land under a contract of purchase with the owners, is not, of itself, sufficient to constitute a valid lien upon the building. In order to bring the case within the provisions of section 262, it must be alleged and proved that the work or labor was done "at the instance of the owner of the building, or his agent," for it is only where such facts appear that the provisions of section 262, to the effect that "every contractor . . . builder, or other person, having charge of the construction . . . of any building as aforesaid, shall be held to be the agent of the owner for the purpose of this Code . . ." applies. To authorize a lien under the provisions of this section, there must be an employment by the owner of the building, or his authorized agent, and the employment of the contractors by Helen F. Hayner, who was occupying the land under a contract of purchase, does not constitute the employment contemplated by this provision of the Code."

An examination of the claims of lien which were filed on behalf of the laborers and recorded prior to the filing of the complaint, (see TR 17, 18, 20, 22, 23 and 25) fails to show that the labor was furnished at the request of the owner, which requirement is essential in a proper lien and we call attention to the last

sentence of the above quoted paragraph from the Russell case which reads, "To authorize a lien under the provisions of this section, there must be an employment by the owner of the building, or his authorized agent . . ." and any lien filed under the Alaska law which does not contain that allegation or, in the words of the Russell case "does not state that the material was furnished at the request of the owner, is fatally defective." The lien itself standing independent, existing as an encumbrance against real property in the Territory of Alaska, must state that the work or material was furnished at the request of the owner or at least the owner's agent and the claims of lien filed on behalf of the laborers do not contain any such allegation. The lien claim fails to state that the owner is unknown and that the reputed owner is (naming the reputed owner). These particular lien claims read as follows: "That the owners and reputed owners of the property are Ralph Russell Thomas and Audrey Cutting." and thus are defective.

THIRD POINT RAISED: 3. THAT THE TRIAL COURT ERRED IN DENYING THE MOTIONS OF DEFENDANTS COUNSEL TO DISMISS AGAINST THE DEFENDANT, AUDREY CUTTING, ON THE GROUNDS THAT SHE WAS NEITHER OWNER OF THE PROPERTY NOR AGENT OF THE OWNER, SYLVIA A. HENDERSON and TENTH POINT RAISED: 10. THAT THE TRIAL COURT ERRED IN RENDERING PERSONAL JUDGMENT AGAINST THE DEFENDANT, AUDREY CUTTING, WHO WAS NEITHER OWNER NOR AGENT OF THE OWNER OF SAID REAL PROPERTY.

NOTE: Points Three and Ten will be considered together.

Regardless of the allegations of the complaints and the allegations of ownership contained in the claims of lien recorded and made part of the complaints, the trial, its testimony, and the various answers and replies filed herein, showed conclusively that Audrey Cutting was neither the owner of the real property nor the agent of the owner and that sole title to the property was vested in Sylvia A. Henderson, a minor, during and at all times referred to in the complaint and thereafter, and particular attention is called to defendant's second amended answer (TR 61) and the third amended answer (TR 65) which amended answers were filed by authority of the Court during the trial of the cause to conform with the proof and in both amended answers Audrey Cutting denies

that she is the owner of the premises and Sylvia A. Henderson alleges that she is the owner of the premises. We call attention to the testimony of Audrey Cutting which was adduced on the first day of the trial (TR 253) in which the witness Audrey Cutting testified that she purchased the lot for her minor daughter and refer also to the stipulation (TR 242, commencing with Line 20) which was presented to the Court by Attorney Davis prior to the taking of the testimony which appears in the Record (TR 253) by which he informed the Court that the record owner of the property was one Ralph Russell Thomas but that on the fourth day of August, 1948, a Deed was recorded in the office of the United States Commissioner for the Anchorage Precinct from Ralph Russell Thomas to Sylvia A. Henderson and that the deed was executed by said Ralph Russell Thomas on the 30th day of November, 1946. It is therefore beyond dispute that the sole owner of the property and the only person who had an interest therein from the 30th day of November, 1946, and during all of the times referred to in the complaint and during the trial of this cause, and thereafter, was Sylvia A. Henderson and that Audrey Cutting had no interest in said property, no right and title therein; was not the agent of Sylvia A. Henderson by virtue of any Power of Attorney, agreement or legal guardianship, and while the said Audrey Cutting was responsible for making a contract with said Russell Smith and could undoubtedly be held to answer at law for the contract price thereof, she could

not be held to answer in a suit to foreclose a lien. We again call the Court's attention to the language appearing in the last paragraph of the Russell vs. Hayner *supra*—"But this is purely an equity suit, wherein appellants seek relief only under the benefits of the law relative to the liens of mechanics and others. They could doubtless bring an action at law to recover a judgment against Helen F. Hayner for whatever amount of money is found due under the contract." It does not appear, in any of the testimony adduced in the trial of this cause or in any of the Complaints or lien claims filed herein that any of the plaintiffs or claimants made any effort to determine who the true owner of the property was and on the basis that it is the duty of a materialman and/or laborer, when he furnishes material or performs labor upon premises that he ascertain the true owner; his failure to do so gives him no right to file a lien or foreclose the same against the true owner when it develops that the person whom he casually assumed to be the true owner turns out to be a disinterested party altogether and that the true owner is one whom the materialman and/or laborer had not previously considered. In support of this principle of law, we cite the case of McCarty vs. Carter 95 Amer. Dec. 572 which case was decided by the Supreme Court of Illinois 1868 and which reads as follows:

"Mechanics and materialmen are bound to ascertain whether the party with whom the contract is made is a minor or person otherwise incapacitat-

ed, for if the contract is with such a person, it is not binding, and the lien of the contractor will fail, and a contract for erection of a building upon premises by one who is not the owner thereof, and who is unauthorized to so contract, is not ratified so as to allow a claim of lien against the premises by mechanics and materialmen, by the fact that the owner, after the completion of the house, received the rents and profits therefrom."

At no time during the trial of the cause did it appear or was it proved by the plaintiffs that Audrey Cutting had any authority whatever to act as agent for Sylvia A. Henderson in the making of the contract or in authorizing the construction upon the premises and inasmuch as the stipulation referred to (TR 242) excludes Audrey Cutting as either an owner or an agent by failing to mention that she was either an owner or an agent, it appears that there are insufficient grounds upon which to base claims of lien for work performed and materials furnished and a judgment based on the proof of ownership or agency of Audrey Cutting certainly is not in accordance with the Alaska Law (ACL 1949, Section 26-1-1) which provides specifically that the work or labor was performed "at the instance of the owner of the building, or his agent."

FOURTH POINT RAISED: 4. THAT THE TRIAL COURT ERRED IN AMENDING SUA SPONTE AND BY JUDGMENT THE PLEADINGS OF PLAINTIFFS TO CONTAIN ESSENTIAL ALLEGATIONS NOT PREVIOUSLY SET FORTH THEREIN and SIXTH POINT RAISED: 6. THAT THE TRIAL COURT ERRED IN AMENDING SUA SPONTE AND BY JUDGMENT THE COMPLAINTS OF PLAINTIFFS SUFFICIENT TO MAKE GOOD CAUSES OF ACTION.

NOTE: Points Four and Six will be considered together.

It is contended by appellants that the trial court erred in amending the Complaints on its own volition sua sponte and by judgment in order to make said complaints conform to the standards of pleading set forth in the case of Russell vs. Hayner 130 Fed. 90.

Upon argument (TR 559), counsel for appellants called attention to the Russell-Hayner case and showed that the various complaints and claims of lien filed in the subject case did not state good causes of action as established by the Russell-Hayner case. Plaintiffs argued that the complaints did state good causes of action and the Court denied the motion. However, in the Court's oral opinion, the following language is found:

"I do not know why it should be necessary to plead anything that the law says exists. The law

says that work done under such circumstances shall be considered to be done—shall be deemed to be done—and materials furnished shall be deemed to be furnished at the instance of the owner.

Yet, our own Circuit Court of Appeals in the case of Haines against Russell evidently held that it was necessary to plead what the law itself provides to be the fact. That decision, it is true, was rendered in 1904. But as far as I know it has never been overruled.

Therefore, I follow it to the extent of saying that the pleadings may be considered amended to contain such averment." (See Supplemental Transcript of Record).

It is thought that the Court exceeded its discretion in amending the complaints to provide allegations not previously included and particularly when plaintiffs had insisted that the complaints did state good causes of action and the Court had previously denied defendants' Motion to Dismiss.

FIFTH POINT RAISED: 5. THAT THE TRIAL COURT ERRED IN AMENDING THE PLAINTIFFS PLEADINGS SUA SPONTE AND BY JUDGMENT TO INCLUDE DEFENDANT SYLVIA A. HENDERSON AS A PARTY DEFENDANT.

It is appellants contention that the court committed error when, by its oral opinion, it amended the pleadings sua sponte by the following language:

"Some of the pleadings fail to refer to the claim of the defendant, Sylvia Henderson. Those pleadings under the proof may be considered as amended by stating in substance that the defendant, Sylvia Henderson, claims some title or interest in the property adverse to the plaintiffs and intervenors but that such claim and title is subordinate to the claims of plaintiffs and intervenors and it shall be considered that any part of the pleadings adverse to the claim of the defendant, Sylvia Henderson, or any other defendant is denied." (See Supplemental Transcript of Record).

It should be remembered that Sylvia Henderson had not been named as a party defendant in the original complaints filed in this action and that no service of process was ever obtained, requested or attempted upon Sylvia Henderson who was absent from the Territory during all this time, commencing prior to the filing of these actions and the final judgment in the case, and that by the use of the language referred to above in the oral opinion, the Court erroneously makes Sylvia A. Henderson a defendant and amends all of the pleadings to show that Sylvia Henderson claims some title or interest in the property adverse to the plaintiffs and intervenors. Now, it is too obvious for argument to assume that Sylvia Henderson, thus became a defendant so that a valid judgment could be rendered against her and the sale of her property ordered by this action of the Court and it is appellants

contention that Sylvia A. Henderson was not before the Court previously by any kind of legal service of summons or by any kind of representation by guardian or guardian ad litem and that therefore this amendment and the subsequent judgment and decree had no force whatever in bringing Sylvia A. Henderson before the Court as a party defendant.

EIGHTH POINT RAISED: 8. THAT THE TRIAL COURT ERRED IN ALLOWING THE LIEN CLAIMS AGAINST THE REAL PROPERTY OF AN INFANT, THE SAID SYLVIA A. HENDERSON and NINTH POINT RAISED: 9. THAT THE TRIAL COURT ERRED IN ORDERING SOLD BY ITS JUDGMENT THE REAL PROPERTY OF SYLVIA A. HENDERSON, A MINOR.

NOTE: Points Eight and Nine will be considered together.

By uncontradicted testimony of Audrey Cutting, the defendant Sylvia Henderson appeared to be a minor female child who had received the property by a conveyance from one Ralph Russell Thomas on the 30th day of November, 1946, and that on that same date or the day following, the said Sylvia A. Henderson executed a mortgage and mortgage note which was filed, together with the deed in the Union Bank at Anchorage, Alaska, and from that date until the 4th day of August, 1948, when the mortgage note was paid off, the said deed remained on file in said Bank

and no present recording of said deed occurred. (TR 409 to 430). However, the fact remains that Ralph Thomas had divested himself on the 30th day of November, 1946, of all interest in said property and that the said Sylvia A. Henderson, on that date, became the legal owner of said property and that the said Sylvia A. Henderson, while represented occasionally by her mother, Audrey Cutting, had no properly appointed guardian authorized to legally represent her in matters pertaining to her affairs and particularly pertaining to the real property owned by her in the City of Anchorage as previously described. That upon the conclusion of the trial there remained no doubt as to the true owner of the real property involved in this foreclosure suit and there remained no doubt that Sylvia Henderson was a minor. Nevertheless, disregarding the minority of the owner of the real property, the Court foreclosed the liens filed by the various laborers and materialmen and ordered the sale of the property in payment of the claims of the mechanics and materialmen and the appellants contend that this ruling of the trial court was in error.

It is appellants' contention that the trial court erred in allowing the lien claims against the real property of Sylvia A. Henderson, an infant. The infancy of appellant Sylvia A. Henderson is beyond dispute and was established by the testimony of her mother, Audrey Cutting (TR 262, Lines 11 and 12) in which the Court inquired

"What is her age at the present time (Sylvia A. Henderson)?" and the witness (Audrey Cutting) replied

"She is seventeen."

And subsequently, counsel for appellants moved the Court to permit the defendants to file an Amended Answer (TR 487, commencing with Line 13) and following counsel's explanation that the Amended Answer alleged the minority of the defendant, Sylvia A. Henderson to conform with the evidence. The Court then said

"Is there any objection?"

to which attorney for plaintiffs replied

"I have none."

The Court then said:

"Without objection, the Amended Answer of Audrey Cutting and Sylvia Henderson may be filed."

In TR 489, Line 18, counsel for the original plaintiffs said, as follows:

"Mr. Grigsby: We admit that Sylvia Henderson is a minor."

Now, it is appellant's contention that the lien claims against the real property of a minor are not valid and we cite in support Jones on Liens, Volume 2, Section 1239, which reads as follows:

"There can be no mechanics' lien upon the land of a minor, for he can make no contract which is binding upon himself or his property. The lien is incident only to a legal liability to pay a debt. It is immaterial that the minor represented himself to be of age. Even if there be a contract with his guardian for erecting a building upon a minor's property, no lien is conferred if the guardian had no authority in law to make the contract."

In the case of *Guy vs. De Uprey* 76 Amer. Dec 518, a case decided by the Supreme Court of California, July, 1860, the Court held, in this case, which involved a situation where a mother purchased property and then conveyed the same to her minor children, that

"Party contracting with guardian to erect buildings on property of infant ward has no equitable lien upon the property for the value of the improvements, if the contract was made without any legal authority on the part of the guardian, with full knowledge of the title and condition of the property on the part of the other party."

The case of *Burke and Williams vs. Mac Kenzie* 52 S. E. 653, a case decided by the Supreme Court of Georgia, 1905, in which the Court held that

"A contract for the improvement of the real estate of a ward by the erection of buildings thereon is not one which the law authorizes the guardian

to enter into and charge the ward's estate therefor."

It will be noted here that the Alaska Compiled Laws 1949, Section 62-2-1 provides that guardians must first obtain license from the Court before selling or encumbering the ward's property. The case of *Fish vs. McCarthy* 31 Pac. 529, decided by the Supreme Court of California 1892, holds as follows:

"Where a mechanic performs work on the property of minors under a contract with the guardian, the mechanic's lien cannot be enforced, where the guardian has not obtained an order of the Court authorizing her to do the work."

We have previously cited the case of *McCarthy vs. Carter* 95 Amer. Dec. 572, which case was decided by the Supreme Court of Illinois, Sept. 1868 and deals with the duty of mechanics and materialmen to ascertain with whom they deal

"Mechanics and materialmen are bound to ascertain whether the party with whom the contract is made is a minor or person otherwise incapacitated, for if the contract is with such a person, it is not binding and the lien of the contractor will fail."

and further states that

"Contract for erection of building upon premises by one who is not the owner thereof, and who is

unauthorized to so contract, is not ratified so as to allow a claim of lien against the premises by mechanics and materialmen, by the fact that the owner, after the completion of the house, received the rents and profits therefrom."

We cite further *Corpus Juris*, Volume 40, Section 90, Page 101, which reads as follows:

"An infant being under a common law disability to contract cannot by a contract for the improvement of his land subject it to a mechanics lien for such improvement; nor will a retention of the property as improved, after majority, amount to such ratification as to sustain a lien * * * Of course there is no lien on an infant's property under a contract made by another person not his guardian and not possessing any authority to bind him."

Clark, in his *Summary of American Law*, Page 153, states as follows:

"It is doubtful whether a Court of equity has inherent power to order a sale of an infant's real property."

The above statement of general principle is supported by the case of *Denniston, etc. Co. vs. Brown* 167 N. W. 190 and further by *Richardson vs. Little* 96 S. 144; *McCarty vs. Carter* 95 Amer. Dec. 572; *Alvey vs. Reed* 17 N. E. 265; *Bloomer vs. Nolan* 53 N. W. 1039. With reference to any person who falsely represents

himself as owner and enters into a contract for a building, the Courts have ruled as follows: Mahon vs. Bitting 137 S. E. 889. This case was decided in 1927 by the Supreme Court of Appeals for West Virginia and holds as follows:

"That a contractor entered into a contract with a person who falsely held himself out as the owner of property, to furnish materials and erect a building on the land, and, after the material was furnished, the work completed and the mechanics lien filed, the pretended owner actually acquired title, the after acquired title would not support the mechanic's lien."

The owner of property was held to be not personally liable in the case of Allison vs. Schuler 36 Pac. 2nd 519. This case, decided by the Supreme Court of New Mexico in 1934 held that the owner of real property was not personally liable to subcontractors for work and material where there was no contractual relation between them, and principal contractor agreed to make payment. The contractor, in the subject case, Russell Smith, had a contract with Audrey Cutting, who identified herself, for the purposes of the contract, as Owner, whereby the said Russell Smith agreed to build a house for the said Audrey Cutting on the real property hereinbefore described under terms and conditions by which the contractor agreed to promptly pay for all materials, supplies and all labor employed by him on the work, to the

end that the property be kept free from materialmen's and mechanic's liens and that he would promptly discharge such liens, if any. It is necessary, at this time, to determine whether there was a contractual relationship between the owner of the property, i. e. Sylvia A. Henderson and the subcontractors performing the work at the instance and request of the contractor, Russell Smith, and, from an examination of the facts, it would appear that there was not. The only contract in existence was a contract between Audrey Cutting and Russell Smith and it is contended that Audrey Cutting had no authority in law or in fact to make a contract for and on behalf of Sylvia A. Henderson for improvements upon the land that would, in any way encumbered or become a burden upon her real property and that even if she (Audrey Cutting) had been the legally appointed guardian of Sylvia Henderson, in order to improve the property through construction of a building thereon, she would have had to obtain the consent of the Court, under Alaska Law so to do, (Alaska Compiled Laws 1949, Section 62-2-1) and therefore the said Russell Smith entered into a contract with an individual who had no authority whatever to bind the real property and any subcontractor working on the said property under contract with and under direction of Russell Smith, likewise were without contractual coverage with Sylvia Henderson and may not, under the law, file lien claims against said real property. It may be considered that Audrey Cutting was an agent acting for and

on behalf of Sylvia Henderson, however, an infant cannot appoint an agent for this purpose, and we cite the case of *Tucker vs Eastridge* 100 N. E. 113, decided by the Appellate Court of Indiana, 1912, which holds that:

"An instruction which assumes that an infant may either enter into a binding contract or may appoint an agent for that purpose is properly refused."

and the case of *Burns vs. Smith* 64 N. E. 94, a case decided by the Appellate Court of Indiana 1902 holding that

"An infant, even though married, could not appoint an agent or become liable for the latter's wrongful acts."

Mechem on Agency, Book I, Chapter 3, Section 51, under the heading "Persons Legally Incompetent." "Infants as Principals." has the following to say regarding infants as principals:

"It has been regarded as the settled doctrine of the Law that an infant cannot empower an agent or attorney to act for him. Indeed, the rule deduced from the authorities has been said to be that the only act which an infant is under a legal incapacity to perform is the appointment of an attorney, or, in fact, an agent of any kind. The reason upon which this rule depends, has been well

stated by the learned editors of the American Leading Cases, as follows: 'The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, FOR IT IS IMPARTING A RIGHT WHICH THE PRINCIPAL DOES NOT POSSESS,—that of doing valid acts.' (Emphasis ours).

The case of Bloomquist et. al vs. Jennings, et. al, Supreme Court of Oregon, 1926, holds that "minor's appointment of agent is voidable."

ELEVENTH POINT RAISED: 11. THAT THE TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST THE REAL PROPERTY OF SYLVIA A. HENDERSON WHEN THE SAID SYLVIA A. HENDERSON HAD NOT BEEN SERVED PERSONALLY NOR CONSTRUCTIVELY WITH SUMMONS IN ACCORDANCE WITH THE LAWS OF ALASKA and TWELFTH POINT RAISED: 12. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS AGAINST SYLVIA A. HENDERSON AT THE CLOSE OF THE TRIAL ON THE GROUNDS THAT SHE WAS NOT MADE A PARTY TO THE ACTION BY PERSONAL OR CONSTRUCTIVE SERVICE OF SUMMONS, AND AS AN INFANT WAS NOT BEFORE THE COURT THROUGH A GENERAL GUARDIAN OR GUARDIAN AD LITEM.

NOTE: Points Eleven and Twelve will be considered together.

In support of this point appellants show that during all the period of time of the filing of the first complaint and the complaints in intervention and the trial of this case that Sylvia A. Henderson was in school in Portland, Oregon and outside the jurisdiction of the Alaska Courts and while legal service of summons together with copies of the original complaints were served upon Audrey Cutting and Ralph R. Thomas, that Sylvia A. Henderson was not made a party to the

original complaint, No. A-5087, nor original complaint No. A-5088.

However, on filing of the Notice entitled Notice of Motion for Leave to Intervene and Make Additional Parties Defendant, (TR 141) filed on the 21st day of October, 1948, the attorney for the Anchorage Sand and Gravel Company notified the Court that he would request authority to name, as party defendant, Audrey Cutting, the mother and next friend of Sylvia A. Henderson, a minor, and that the Order granting leave to intervene gave authority to list, among other parties defendant "and Sylvia A. Henderson, a minor, who have interest in the subject matter to be determined by the Court in the case of Ray Bullerdick et al." (TR 149, Lines 10, 11 and 12) and that this Order was endorsed by the Court and filed on the 10th day of November, 1948. And that subsequently, all complaints in intervention listed Sylvia A. Henderson as a party defendant. However, regardless of the action of the Court permitting the plaintiffs in intervention to add the name of Sylvia A. Henderson, a minor, to the complaints in intervention, at no time subsequent thereto, was a summons ever issued or service made upon the said Sylvia A. Henderson and that she was not a party to the case or made a party thereto or brought into Court by the service of process in accordance with the laws of Alaska and appellants contend that any decision of the trial court dealing with Sylvia A. Henderson or her real property was beyond the jurisdiction of said court and that any judgment against Sylvia A.

Henderson or her property is invalid. The laws of Alaska regarding service of process provide as follows: Section 55-4-6, Compiled Laws of Alaska 1949

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the clerk of the court as follows:

Third: (Action against minor). If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within the Territory, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

Fourth: (Action against incompetent). If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and if a guardian has been appointed, to such guardian and to the defendant personally.

Fifth: (Personal service on defendant). In all cases, to the defendant personally, or if he be not found, to some person of the family above the age of fourteen years at the dwelling house or usual place of abode of the defendant."

There was no attempt made to serve Sylvia A. Henderson following the granting of the Motion to add parties defendant and inasmuch as there was no

general guardian or guardian ad litem appointed by the Court at the commencement of this trial, or during the course thereof, it is apparent that the sole owner of the real property against which the foreclosure was granted and which was ordered for sale was never before the Court as a party defendant.

It should be further noted that the authority to add Sylvia A. Henderson, a minor, as a defendant was granted several months prior to the actual trial and that there was opportunity on the part of all plaintiffs to have a summons issued and directed to the said Sylvia A. Henderson and that none of the plaintiffs considered it necessary to have this important action taken to bring Sylvia A. Henderson before the Court as a proper defendant.

THIRTEENTH POINT RAISED: 13. THAT THE TRIAL COURT ERRED IN APPOINTING AUDREY CUTTING GUARDIAN AD LITEM AT THE CLOSE OF THE TRIAL BY ITS ORDER NUNC PRO TUNC.

Section 62-1-21, Compiled Laws of Alaska 1949, provides that the

"District Court shall have the power to appoint a guardian to defend the interests of any minor * * * impleaded in such Court or interested in any suit or matter therein pending and the power to appoint a guardian ad litem for such infant * * * to commence, prosecute or defend any suit on behalf of said infant * * *"

Infancy, therefore, in Alaska Courts, is a disability and no infant can be brought into Court in a proper action unless through a guardian or guardian ad litem. The plaintiffs in the present case, in most instances, ignored the position of the infant, Sylvia A. Henderson as sole owner of the real property (Sylvia A. Henderson was first referred to in a Notice for Motion for Leave to Intervene and make additional parties defendant, filed on October 21, 1948, TR 141), filed their actions against the former owner, Ralph Thomas, who had previously and on or about the 30th day of November, 1946, divested himself of all right, title and interest in said property and Audrey Cutting as reputed owner and assuming, for the purposes of this argument, that the plaintiffs were ignorant (regardless of the Notice of Motion of October 21, 1948, TR 141) of the ownership of the property by the infant Sylvia Henderson and of her indispensable position as a party defendant for a proper adjudication of this case, the Court immediately cured the defect of ignorance upon the opening of the trial on the 8th day of February, 1949, by calling attention to the fact that Audrey Cutting was answering for her minor daughter, Sylvia A. Henderson (TR 241, Lines 10-17) and on Page 242, Line 9, the Court stated as follows:

"In looking over the pleadings I notice that nowhere is Sylvia A. Henderson named as a party."

Attorney Davis, thereupon called the Court's attention to the fact that the name Sylvia A. Henderson

appeared in a Complaint in intervention filed by Mr. McCarrey, attorney for Anchorage Sand and Gravel Company, and that her name appeared in the title of the case, about five lines up from the bottom of the page. (TR 242, Line 9). This subsequent inclusion of Sylvia A. Henderson as a party, however, in a complaint in intervention, when the original complaints, No. A-5087 and A-5088, did not include Sylvia A. Henderson as a party and all other complaints in intervention ignored the position of Sylvia A. Henderson as sole owner of the property and made no effort to obtain service upon her, is not competent to make Sylvia A. Henderson a party to this action.

Thus, at the commencement of the trial, before any testimony was taken, attention of all parties and their attorneys was called to the fact that Sylvia A. Henderson had some interest in the proceedings and that she had not been properly made a party thereto and obviously had not been served with process. Upon the commencement of the taking of testimony and immediately following the testimony of Arthur A. Waldron, Attorney Grigsby called Appellant Audrey Cutting as his witness and established the fact that the true owner of the real property against which the lien claims were filed was Sylvia A. Henderson, a minor. No question was raised regarding the witness Cutting's right, at this time, to either appear in Court on behalf of her minor daughter or to ascertain whether she had been appointed legal guardian for her daughter and was properly in Court on her daugh-

ter's behalf. Without further reference at this time to the question as to guardianship and the matter regarding the legality of the proceedings insofar as Sylvia A. Henderson was concerned, the trial continued and the matter of guardianship was only brought into the proceedings again when the plaintiffs rested their case and the defense called Audrey Cutting. Attorney McCarrey, on cross examination, raised the question of guardianship (TR 396) and upon further re-direct examination (TR 398) Mrs. Cutting's counsel raised the question of guardianship and adduced that while Mrs. Cutting had made application for guardianship, that such guardianship had not been consummated and the matter was then gone into further (TR 403) and counsel for the defendants stated to the Court

"I believe, then, that I was endeavoring to determine whether Mrs. Cutting was actually guardian or whether there was just proceeding in process."

to which the Court replied,

"And she was uncertain. She said there were proceedings in court but she doesn't know the precise state of the proceedings. I suppose if that is of ANY CONSEQUENCE the files can be brought in or some other proof will be given to show just what the status of the guardianship proceedings are at this time." (Emphasis ours).

whereupon the following exchange between attorney and witness occurred:

"Q. (By Mr. Butcher): Then I will ask, Mrs. Cutting, during any of the times mentioned in the various complaints and during the construction of this home and the filing of the liens, were you the guardian of Sylvia Henderson?

(Testimony of Audrey Cutting)

A. I hadn't been appointed by the Court, no.

Q. When did he commence the present proceedings?

A. In December.

Q. In December of 19——?

A. 1948.

Q. And you, I believe, testified that Mr. Peterson represented you?

A. Yes, sir.

Q. Had you ever in any other Court at any time been appointed guardian for Sylvia Henderson?

A. I was under the impression I was her guardian but I hadn't actually been appointed.

The Court: I beg your pardon?

The Witness: I was under the impression due to it but I had not been appointed officially by the Court.

Q. (By Mr. Butcher) Had any papers been processed in Nome making you guardian?

A. Nothing else but the divorce decree.

and the testimony of Mrs. Cutting above stated, established the fact that Mrs. Cutting was not guardian of Sylvia A. Henderson and her relationship to said Sylvia A. Henderson was only that of a parent who had obtained custody in previous divorce proceedings and nothing else. The Court, on TR page 403, Line 17 through Line 23, by its statement, indicated or suggested that the question of guardianship, at least insofar as the Court was concerned, had no consequence. It is the opinion of appellants that the question of guardianship was of the greatest consequence and that if Mrs. Cutting was not the guardian of Sylvia A. Henderson, by legal appointment of any Court, then she could not possibly represent Sylvia A. Henderson in the subject trial and inasmuch as the Court had not felt it necessary to appoint Audrey Cutting guardian ad litem for the purposes of this trial until the end of the trial, then it is obvious that the proceedings insofar as they involved Sylvia A. Henderson, had no validity and the subsequent decree of the Court was invalid as far as Sylvia A. Henderson was concerned, nevertheless the said Sylvia A. Henderson, a minor, had been, by erroneous decree of the Court, deprived of her property without due process of law.

Upon the completion of the case when plaintiffs and defendants both rested (TR 558, Lines 21-27),

counsel for the defendants moved the Court that the action be dismissed against the defendant, Sylvia A. Henderson (TR 559), commencing with Line 5 and continuing to Line 9, TR 562). The Court, thereupon, denied the Motion to Dismiss as to Sylvia A. Henderson and responded as follows: (TR 561, commencing with Line 11)

"The Court: Pardon me, before citing the cases. Was there not an order made here appointing Mrs. Cutting as guardian ad litem for the minor?"

"Mr. Butcher: Not to my knowledge."

"The Court: The Court now makes such an order and the plea may be amended if necessary to conform with that order and to BRING SYLVIA HENDERSON INTO COURT. Counsel was in error in not heretofore advising the Court that he did not represent Miss Henderson. I assumed that it had all been arranged." (Emphasis ours).

It is appellants contention that the Court, by refusing to dismiss the action against Sylvia Henderson, a minor, committed error and denied to the said Sylvia Henderson her rights under the law. We cite in support Williston on Contracts, Section 248, Page 735, which reads as follows:

"An infant cannot personally prosecute an action in court. An action on his behalf must be brought either by his guardian or by a next friend. It is a good plea in abatement that a plaintiff who sues

without a guardian or next friend is an infant. And if a judgment is entered against an infant plaintiff who sues without thus being represented, the judgment will be voidable * * * If the infant has no general guardian, or if the general guardian has an adverse interest, the court will appoint a guardian ad litem. The infant has no power to bind himself by an appearance on his own behalf, or by an attorney of his own appointment, or by a next friend; and a judgment obtained against the infant without the appearance of a guardian, or guardian ad litem, is voidable, as is a judgment against an infant who was represented only by a guardian whose interests were adverse."

We further cite the following cases: *Parker vs. Smith* 117 So. 249, which was heard in 1929 and holds that

"If an infant is not legally served, appearance of his solicitor will not bind infant."

Laute vs. Gearhart, 165 A. 115, affirmed 170 A. 646, a New Jersey case and holds that

"An attorney is unauthorized to acknowledge service for infant defendant."

Lehy vs. Hardy 232 N. Y. S. 543. This is a New York Appellate decision heard in 1929 and holds that

"Attorney's appearance in behalf of infant for whom no guardian ad litem has been appointed, is ineffective."

We further cite the case of *Power vs. Lenoir* 56 Pac. 106 which holds as follows:

"Where a father appeared as guardian for his minor children without having qualified as their guardian, and defended an action against them with reference to their separate property, a nunc pro tunc order appointing him their guardian ad litem before judgment rendered against them was unauthorized, and they were not bound by the judgment so entered."

In the case of *Sealey vs. Smith*, 197 Pac. 490 Supreme Court of Oklahoma 1921, the Court held, in interpreting a statute regarding service of summons upon minors similar to the Alaska statute, as follows:

"We are unable to understand how the trial court in the case at bar can sustain the validity of a judgment divesting a minor defendant of valuable property under the record as it appears in the case at bar. It is the duty of a trial court to guard the interest of infant defendants and see that every available defense is made for them in the trial of a cause, and under the statutes in force in this state it is mandatory upon the trial court to appoint a guardian ad litem to represent infant defendants. The first duty of the trial court

is to examine the service made upon a minor defendant, and if the same is regular approve the same, and then appoint a guardian ad litem, who must make the defense for such defendants."

We also call the attention of the Court to the case of *Halton vs. State*, 225 Pac. 894, Supreme Court of Oklahoma, 1924, in which the Court, in passing on the question of summons as it pertains to minors and appointment of guardian ad litem, spoke in the following language:

"The only way a defense for a minor can be made is by a guardian appointed for such purpose. The statute is mandatory in this respect, and any proceedings had against a minor, without the appointment of such a guardian to defend for him, are null and void and not binding upon said minor, and, under such circumstances, the court is without jurisdiction to render judgment against said minor."

An examination of *Amer. Jur.* Volume 27, Title "Infants," under the general heading "Actions by and against infants," Section 113, we find the following general law pertaining to service upon infants and the appointment of guardian ad litem:

"When an infant appears as a party to an action pending before a Court, he becomes a ward of the Court, and it is its duty to see that his interest is protected."

Section 116:

"An infant can neither sue nor defend a suit in his own name but must be represented by an adult."

Section 120:

"The legal representative of an infant, in making defense to an action, was called at the common law his guardian ad litem, and this term is preserved in modern practice * * * If the infant or his friends do not take steps to procure the appointment of a guardian to defend for him, the plaintiff's counsel * * * must call it to the attention of the court and see that a guardian is appointed for every infant defendant, at the risk of having his judgment rendered erroneous by the omission." * * * "The fact that an infant defendant is actually represented at a trial by his parents, or that adult defendants whose interests are the same as those of the infant are making proper defense by their counsel, does not cure failure to have a guardian ad litem appointed to represent the infant."

See Johnson vs. Waterhouse 26 N. E. 234 and State vs. Stark 129 N. W. 33. Section 138:

"The fact that the law prescribes a special method of defense by an infant defendant does not dispense with the regular and legal service of process against him in beginning the action * * *

"According to the present weight of authority, it is irregular and erroneous to appoint a guardian ad litem for an infant or (where such service is permitted, as in the case of some jurisdictions, especially with reference to infants under fourteen) on a parent, guardian, or near relative in behalf of the infant." * * *

"Where an infant has not been served with process, a judgment or decree against him or affecting his interests is erroneous, and the appointment of a guardian ad litem, or an appearance or answer by said guardian, does not bring the infant before the court, so as to justify such judgment or decree."

In support of the above rule, Am. Jur. cites the case, among many others, of *Bank of U. S. vs. Ritchie* (1834) 8 Pet (US) 128, 8 L ed. 890, wherein a suit to sell a decedent's real estate for the payment of debts, a guardian was appointed for infant heirs not served with summons, on motions of plaintiff's counsel, without bringing the infants into court or issuing a commission to make the appointment, the court said that this was contrary to the most approved usage and was certainly a mark of inexcusable inattention as the adversary counsel was not the person to name the guardian. For this and other irregularities, the decree was reversed.

Referring further to 27 American Jurisprudence, Infants, Section 138, we quote

"It has been held that in original cases in the courts of the United States sitting in equity, a guardian ad litem cannot be appointed nor the infant bound until service of process upon him." * * *

"Where it appears affirmatively on the face of the record that the infant has not been served with summons, the infant is not bound by the proceedings."

In the case of *Clark vs. Neves* 57 S. E. 614, a case arising as a result of an attempt to sue minors and the procurement of judgment based on the signature of a party who certified that she was the guardian ad litem and accepted service on behalf of certain minor children, the Court held as stated above, that where the record shows no service on the infant he is not bound by the proceedings.

Section 140 of the same title, Am. Jur., reads as follows:

"An infant can neither acknowledge nor waive the regular service of process upon him. Jurisdiction is not conferred by the appearance of the infant or by that of an attorney at law. A general appearance and filing of a demurrer by counsel for the defendants cannot be treated as an appearance for infant defendants who were not served, where there were also adult defendants. Moreover, the father of an infant defendant may

not enter the infant's appearance in a suit in which the latter is named defendant. Furthermore, acknowledgement out of the state, by the father of an infant defendant, of service of summons is ineffectual to bring the infant before the court.

An appearance or answer by a guardian ad litem does not bring the infant before the court where he is not served, and a judgment rendered under such circumstances is voidable. There is, however, a conflict of authority as to whether such a judgment is void. It is often held that a guardian ad litem cannot waive service of process, or confer jurisdiction by making appearance or filing pleadings for the infant. It is held in many cases that the lack of service of the infant is a fatal, because jurisdictional defect, and cannot be cured by the appointment of a guardian ad litem and his making actual defense for the infant; this ruling seems consistent with the lack of power on the part of the guardian to bind the infant by his admissions or stipulations."

It, therefore, appears that under the law, no proper adjudication could be made of the real property of Sylvia A. Henderson and the Court erred in rendering the Decree and Judgment and ordering the sale of said real property to pay off the liens. The Court, it appears, made a double error in this particular instance. First, by failing to appoint a guardian ad litem

for and on behalf of Sylvia A. Henderson, a minor, when the Court, at the commencement of the trial, was informed that Sylvia A. Henderson was a minor and itself observed (TR 243, Line 9) that Sylvia A. Henderson had not been made a party defendant and later when it was specifically drawn to the Court's attention that the child had no general guardian; and its subsequent failure to dismiss the action insofar as Sylvia A. Henderson was concerned when it was brought to its attention that Sylvia A. Henderson had never been made a proper party defendant, had never been served with legal process and had only been made a party defendant, in the case, through the filing of a Notice of Motion for leave to intervene and make additional parties defendant, and that the Court's action in its oral opinion previously quoted, in amending sua sponte all complaints to show Sylvia A. Henderson a proper party defendant, and in the Court's language "bring her into court" (TR 561, Lines 15-21) was ineffective and of no legal significance.

It must not be overlooked here that the sole owner of the real property was Sylvia A. Henderson, a minor, that she had been sole owner since the 30th day of November, 1946, when she took delivery of a deed from Ralph R. Thomas and gave back a purchase money mortgage to the said Ralph R. Thomas and ultimately paid off the note based on the mortgage. To consider that Sylvia A. Henderson was not the owner of the property, because of her failure to record the deed until the 4th day of August, 1948, is to

deny title, without sufficient cause. Failure to record under the Alaska law only affects the title holder in the event of future conveyance from the original vendor to an innocent purchaser for value. Ralph R. Thomas had no interest whatever in the real property at the time the deed was recorded or at any time previous, from the date of conveyance to the date of recording, except that of mortgagee until payment was made. He had nothing to do with the construction of the building, made no contract therefor, did not appear in the case to defend his position and had no right, title or interest to be adjudicated. The decision of the trial affected no one except a minor female who was not served with process and had no guardian appointed to represent her at a trial PRIMARILY CONCERNED with the disposition of her real property.

FOURTEENTH POINT RAISED: 14. THAT THE TRIAL COURT ERRED IN FINDING AGAINST THE EVIDENCE THAT THERE WAS NO DELIVERY OF THE DEED OF THE REAL PROPERTY FROM RALPH THOMAS TO SYLVIA A. HENDERSON and FIFTEENTH POINT RAISED: 15. THAT THE TRIAL COURT ERRED IN FINDING AGAINST THE EVIDENCE, THAT SYLVIA A. HENDERSON DID NOT EXECUTE A MORTGAGE TO RALPH THOMAS OF SAID REAL PROPERTY.

NOTE: Points Fourteen and Fifteen will be considered together.

Appellants contend that the trial court erred in finding that there was no delivery of the deed from Ralph Thomas to Sylvia Henderson.

The testimony of Audrey Cutting relative to the deed and mortgage and mortgage note appears in the Transcript of Record, commencing on Page 409, Line 25 and continues to TR 423, Line 4. Cross examination of the witness Audrey Cutting on the subject of the deed and mortgage occurs in the Transcript of Record commencing on Page 425 and continues to the bottom of Page 429 and for argument on this point, we set forth the contents of "Defendants' objections to Findings of Fact and Conclusions of Law and Judgment as Proposed by Plaintiffs" (TR 74) and adopt the language and argument of that objection to support Points Fourteen and Fifteen. We quote the contents as follows:

Findings of Fact and Conclusions of Law, which under our code, are essential to judgment in non-jury cases must be found and determined in accordance with well established principles of law, one of which we quote as follows:

"Findings are clearly improper when made in favor of a party who, having the burden of proof upon an issue, offers no evidence relative thereto."

This quotation is made from Bancrofts Code Practice and Remedies, Volume II, Section 1692, Page 2173, and the same section in Volume III of Bancrofts Supplement, page 2219, reads as follows:

"But a finding contrary to uncontradicted evidence is not authorized."

These rules of law are supported by the cases of *Rudneck vs. Southern California Metal Company*, 193 Pac. 775, *In re Rasmussen* 205 Pac. 72, and *Watkins vs. Glass*, 89 Pac. 840 and *Richards vs. Jarvis*, 258 Pac. 317.

It is defendants' contention that paragraph XXIX, page 7, of the proposed Findings of Fact and Conclusions of Law not only is not supported by the evidence, but that the plaintiffs, on whom rested the burden of proving that there was no delivery of the deed, offered no evidence whatever on the subject and that the only evidence offered was by the defendant, Audrey Cutting, and by the introduction of the deed itself and the copy of the mortgage into evidence, together with the mortgage note.

Disregarding all oral testimony of the witness Audrey Cutting, and concerning ourselves with the deed alone, we find that the deed itself creates a legal presumption of delivery as of the date of its making. This rule is clearly stated on page 84 of the last edition of *Jones on Evidence Civil Cases*, Volume I, Section 50, and which reads as follows:

"So where a deed is duly signed, attested and witnessed, there arises a presumption of sealing and delivery and the time of its execution and delivery is presumed to be on the day of its date."

This rule of law is amply supported by ruling cases and by other text writers on the subject, "Pre-

sumptions in Evidence." Therefore, by the deed alone, there was created a presumption of delivery in the defendant, Sylvia Henderson, which until rebutted by evidence that no delivery occurred, was controlling. The writer has been unable to find any case whatever which indicates that the act of recording is any evidence of the act of delivery under such circumstances.

The presumption of delivery by virtue of the deed placed the burden of proving non-delivery of the deed on the plaintiffs.

The un rebutted presumption of delivery of the deed to the defendant, Sylvia Henderson, standing alone would prevent a finding as set forth in paragraph XXIX of the proposed findings, however, the presumption of delivery does not stand alone. It is supplemented by the uncontradicted testimony of Audrey Cutting and the further proof, also uncontradicted, of the making of the mortgage and its signing by Sylvia Henderson together with the mortgage note. There is, therefore, no basis for the finding of delivery on August 4, 1948, as set forth in paragraph XXIX and no basis in law by which the court could find otherwise than in accordance with the uncontradicted proof of the defendant.

Therefore, it is requested that the finding that there was no delivery of the deed until after construction of the buildings be struck from the Findings of Fact and the Judgment.

The foregoing was filed in opposition to paragraph XXIX of the Findings of Fact and Conclusions of Law endorsed and entered by the Court on April 4, 1949.

An examination of the law, as it pertains to delivery of deeds, indicates, as stated above, that the act of recording has nothing whatever to do with the act of delivery insofar as it bears upon the fact of delivery. The Court found that delivery of the deed did not occur until August 4, 1948, because it was on that date that recording occurred.

Tiffany on Real Property, Volume IV, Section 1034, Page 199, under the general heading "Modern view; intention as controlling over manual transfer" lays down the following principles of law:

"While, as before stated, the necessity of delivery in connection with negotiable and sealed instruments, and others of an analogous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression "delivery" as used in this connection, has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. Accordingly, it is generally agreed that delivery does not

necessarily involve any manual transfer of the instrument, and provided an intention is indicated that the deed shall take effect, the fact that the grantor retains possession of the instrument is immaterial. So, while it is frequently said, both by the older and later authorities, that delivery may be made to a third person for the benefit of the grantee, or to one of several grantees for the benefit of all, meaning thereby that the conveyance may take effect by reason of physical transfer of the instrument to a third person, this would seem to result, not from any particular virtue in the transfer, but from the fact that the transfer may show an intention to make the instrument legally operative. A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him, if satisfactorily proven, and would indeed, as affording indubitable evidence of the grantor's intention, have a conclusiveness that might be lacking in the case of a mere manual transfer. Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not constitute a delivery; nor does such a transfer to the grantee himself, if the transfer is not with such intention, but is for another purpose as, for instance, to enable him to examine the instrument, or to hold until the signatures of other grantors have been added. Of course, there

is no delivery where the deed is taken from the grantor forcibly and against his will."

If the modern view is that the intention of the parties is to determine whether delivery occurs, then the intention of Sylvia Henderson and Ralph Thomas should be determined from the conduct of the parties.

Ralph Thomas made a deed to Sylvia Henderson dated November 30, 1946, on the same or the day thereafter (TR 413, Lines 16 and 17) (TR 426, Lines 11 and 12) a mortgage and note were executed.

The testimony of Audrey Cutting with reference to the deed and mortgage occurs commencing TR 409, Line 25 and continues through direct and cross examination to TR 430, Line 3. The examination shows that the deed was drawn up by the witness Cutting's attorney, Stanley McCutcheon, and that it was signed by Ralph R. Thomas, that on the same day, Attorney McCutcheon also drew a mortgage from Sylvia Henderson to Ralph Thomas for the same property as described in the deed, together with a note for \$1,500.00. That both mortgage and note were signed by Sylvia A. Henderson and the note by both Sylvia A. Henderson and Audrey Cutting, that these papers were then turned over to Mr. McCutcheon and were later placed in the Union Bank. Mrs. Cutting was unable, at the time of trial, to find the original mortgage but did procure a copy of the mortgage from the office of Attorney McCutcheon. This mortgage was entered into evidence as defendants' exhibit

No. 103, and appears in the Transcript of Record, Page 415. The original of the note was then introduced into evidence, marked defendants' exhibit No. 104 (TR 419).

The direct examination established the fact that the deed was delivered and a mortgage (Purchase Money) taken back by the vendor Ralph Thomas; and the cross examination supported the fact and strengthened the direct testimony. There was no evidence offered by plaintiffs to impeach this testimony.

For reasons not disclosed the deed, mortgage and note were turned over to the Bank and none of the papers were recorded until the recording of the Deed on August 4, 1948.

Tiffany on Real Property, Volume V, Section 1262, Page 13, on the legal effect of "recording" reads as follows:

"The rule first above referred to, that, as between conveyances of the legal title, the first in time must prevail, has been entirely changed by the recording acts, which exist in every state, and which provide in effect that a conveyance or mortgage of land, and frequently any other instrument affecting land, shall not, as against a subsequent conveyance or mortgage in favor of a purchaser for value, be valid, unless it is filed for record in a public record office. The requirement of record has almost invariably been regarded as intended for the protection of sub-

sequent purchasers only, so that a failure to record the instrument in no way affects the passing of title as between the parties thereto. The grantor merely retains, by force of the statute, a power to defeat the conveyance, if not recorded, by a subsequent conveyance to another.

The construction placed by the courts upon the recording acts has been in effect to protect a subsequent purchaser as against a prior instrument, if he pays value in ignorance of such instrument, and to make the record of an instrument in accordance with the act equivalent to notice to the subsequent purchaser of the existence and contents of the instrument, irrespective of whether he actually examines the records so as to obtain such information. And the record is notice not only of the instrument and of the facts stated therein, but also of any other matters as to which the necessity of an inquiry is suggested by statements in the instrument. The practical effect of the acts is that an intending purchaser of land may, by reference to the record, determine whether his vendor has previously disposed of any interest in the land and also ascertain both the person from whom his vendor obtained the land, and whether such person had disposed of any interests to a person other than such vendor, and so, in the case of each of the successive owners of land, determine whether during the period of his ownership, he

created any interest not vested in the present vendor. The series of successive conveyances by virtue of which the vendor or another asserts ownership of the land is frequently referred to as his or the "chain of title," each conveyance constituting, figuratively speaking, one link in the chain."

This would indicate the general rule that title passes to the vendee regardless of recording. In the State of Maryland, by special statute, title does not pass until recording occurs, the law in Alaska is different and in Alaska, as shown by the case of *Wooldridge vs. Williams*, 5 Alaska Reports 149, recording has no effect upon title. This case holds as follows:

"Whether or not an instrument is required to be recorded under the bankruptcy laws depends upon the laws of the state or territory wherein the property is situated. *Humphrey vs. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; *Thompson vs. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577. It has been held that a state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons, is a law by which recording is "required" within the meaning of the Bankruptcy Act of July 1, 1898 (see Chapter 541, 60a, as amended by Act Feb. 5, 1903; *Loeser vs. Savings Deposit Bank & Trust Co.* 148 Fed.

975), and that "if recording be not required, unless required for all purposes, it could never be said to be required where the instrument is valid between the immediate parties without recording" (In re Beckhaus, 177 Fed. 141, 100 CCA 561).

Undoubtedly, under the statutes in force in this district, conveyances of real property may be recorded (section 499 C. L. A.); but a record is not required for all purposes. As between the parties themselves, a conveyance is good without record.

'Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void (as) against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.' Section 524, Comp. Laws Alaska 1913."

Certainly the deed between Ralph R. Thomas and Sylvia A. Henderson served to vest legal title in her ,and by giving such a deed, Ralph R. Thomas divested himself of all right, title, and interest, and held nothing back to be foreclosed upon. On November 30, 1946, title passed to Sylvia A. Henderson. On August 4, 1948, title was in Sylvia A. Henderson, and at all times between those dates title was vested in Sylvia A. Henderson and at the time of trial was her

sole property. We quote Section 22-3-25, Compiled Laws of Alaska 1949, which reads as follows:

"Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

It is contended that a mechanic's lien holder is not an innocent purchaser for value and that only an innocent purchaser for value (Purchaser of the realty) is protected by failure of the owner to record, and that an unrecorded deed is not in that classification of "other incumbrances" and that the legislature, by using the phrase "other incumbrances" referred to in Section 26-1-3, Compiled Laws of Alaska 1949, which reads as follows:

"A lien created by this code upon any parcel of land shall be preferred to any lien, mortgage, or other incumbrance which may be attached to the land subsequent to the time when the building or other improvement was commenced, or the materials were commenced to be furnished and placed upon or adjacent to the land; also to any lien, mortgage or other incumbrance which was unrecorded at the time when the building structure, or other improvement was

commenced, or other materials for the same were commenced to be furnished and placed upon or adjacent to the land; * * *"

meant encumbrances in the nature of mortgages, liens, etc., and not titles to the realty itself. In other words, a deed, being an instrument of title, is not an encumbrance upon its own title.

The case of *Schwartz vs. Rappaport et al*, 187 N. Y. S. 611, heard by the Supreme Court of New York, April 6, 1921, which case holds as follows:

"In the absence of a statutory provision, the holder of a mechanic's lien has no greater rights than a judgment creditor, and his lien is subject to the rights of those holding deeds or mortgages, though unrecorded when the mechanic's lien was filed." quoting *Payne vs. Wilson*, 74 N. Y. 348, 355 et seq.

Bouvier's Law Dictionary Unabridged has the following definitions of the word incumbrance:

"1. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee."

2. Every right to or interest in the land which may subsist in third persons to the diminution of the land, but consistent with the passing of the fee by the conveyance."

and in further defining what incumbrances are, Bouvier lists the following:

An ordinary lease

An attachment

The lien of a judgment

Taxes and municipal claims

An execution sale subject to redemption

A restriction of the use of land for a brewery

An inchoate right of dower

An easement for a party wall

A private right of way

A railroad right of way

An attachment

A right of removal of timber from land

A reservation of minerals

A public highway

An outstanding mortgage

A liability under tax laws

A condition of non-performance of which by the
grantee may work a forfeiture of the Estate

A restriction as to the kind of building which may
be erected on land

A mechanic's lien

All the foregoing have been held to be incumbrances. It would thus appear that the Alaska legislature which used in its lien statute the phrase "and other incumbrances" did not intend that a deed itself was an incumbrance which necessarily would have to be upon the very land to which the deed gave title.

THE SIXTEENTH POINT RAISED WILL NOT BE ARGUED.

ADDITIONAL ARGUMENT

This argument deals with the effect of the contract entered into between Russell Smith and Audrey Cutting for construction of the residence. It will be noted that Paragraph 24 of the Contract provides as follows:

"The Contractor shall promptly pay for all materials, supplies, and all labor employed by him in the work to the end that the property may be kept free from materialmen's and mechanic's liens, and shall promptly discharge such liens, if any."

It will also be noted that the contractor's credit was not good. (Testimony of Arthur Waldron, TR 251, Line 19) (Testimony of Harry Goudchaux, TR 517, Lines 23-26) (Testimony of Lyle Anderson, TR 327, Lines 5-28), and he was apparently near insolvency at the time he made the contract with Audrey Cutting.

It was necessary for him, regardless of the specific condition of his contract, i. e. to pay all wages and bills for materials promptly, to make a special agreement with laborers and materialmen, to wait until the building was erected and he had collected the contract price from Audrey Cutting, for payment of their wages and accounts. (TR 273, Lines 21-28).

The evidence is indisputable that the contractor did not keep the costs of construction within the contract price, i. e. \$9,800.00 or the extra \$200.00 to \$400.00 (TR 259 and TR 284). The total sum of all the laborers and materialmen's liens as set forth in the original lien claims and prayed for in the complaints and as awarded by the Court, excluding the lien claims of Russell Smith, and not including interest, recording fees, etc., is \$11,533.76, and is computed as follows:

Laborers:

Ray Bullerdick	\$ 627.77	
A. L. Baxley	914.88	
Edward C. Rankin	494.76	
Lee Runckle	734.16	
Arden Bell	760.76	
Wm. Besser	64.00	
		<hr/>
Total Wages	\$3,596.33	\$ 3,596.33

Materialmen:

Brady's Floor Covering	\$ 474.41	
A. V. Fritts	700.00	
City Electric	473.99	
Arthur A. Waldron and J. A. Columbus	377.61	
Arthur A. Waldron and J. A. Columbus	628.27	
Ketchikan Spruce Company	2,717.86	
Alaskan Plumbing & Heating Co. ..	1,685.00	
Ken Hinchey	680.49	
Ray Wolfe	199.80	
Total	\$7,937.43	\$ 7,937.43
		<hr/>
Grand Total Costs		\$11,533.76

The above represents the exact cost of the labor and material for construction of the house. Assuming that the contractor added to his costs (a point on which he was silent) a legitimate contractor's fee, or even wages for his own time, to come out even, he would have had to bill Mrs. Cutting in excess of \$13,000.00. This excess cost of construction is, of

course, at the heart of the difficulty. Mrs. Cutting stood ready and willing at all times to pay the contractor \$10,000.00, i. e. the contract price of \$9,800.00 plus \$200.00 for the extra porch (TR 357, Lines 10 to 26).

Upon the contractor's demand for \$13,500.00, Mrs. Cutting refused to make payment, offering instead the amount of the contract plus the extra. Meanwhile, the laborers, who had not been paid as a result of their own concession to wait until the completion of the job for payment, together with the materialmen, filed lien claims, which were subsequently foreclosed by the Judgment and Decree.

CONCLUSION

It appears to us in retrospect that the issues of this case are clear and we are of the opinion that had the various counsel participating in the case and the Court had been better informed on the law regarding mechanic's liens, the rights and limitations of infants, guardianship and Court procedure under actions involving guardian ad litem, that the issues could have been made much clearer during the trial of the case. It appears, however, that the ultimate effect of the judgment and decree was to deprive a minor female of her property without due process of law, i. e. failure of process, failure in appointment of guardian ad litem, and that the judgment and decree affects in no way the defendant, Ralph Thomas because he was fully paid for the

property and affects only an infant who was not present in the Territory of Alaska during the period from the filing of the liens to the entry of judgment and decree.

It is earnestly and respectfully submitted that the Findings of Fact and Conclusions of Law and the Judgment and Decree rendered and entered by the trial Court were contrary to the evidence and contrary to the law and thus in error and that the Judgment and Decree should be reversed with the true principles of law and equity applied in this case.

Dated at Anchorage, Alaska, this 4th day of October, 1950.

HAROLD J. BUTCHER
Attorney for Appellants

No. 12,324

IN THE

United States Court of Appeals
For the Ninth Circuit

AUDREY CUTTING and SYLVIA A.
HENDERSON,

Appellants,

VS.

RAY BULLERDICK, et al.,

Appellees.

BRIEF FOR APPELLEES.

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IN THE
United States Court of Appeals
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AUDREY CUTTING and SYLVIA A.
HENDERSON,

Appellants,

vs.

RAY BULLERDICK, et al.,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

On or about the 30th day of November, 1946 Ralph R. Thomas, defendant in the Court below, executed a deed to the premises which have been foreclosed by the judgment from which the appeal is taken, to appellant, Sylvia A. Henderson, the minor daughter of appellant, Audrey Cutting, and about sixteen years of age. The negotiations were conducted by Audrey Cutting assuming to act as her daughter's guardian. According to her testimony the purchase price of the property was \$1800.00 of which she paid \$300.00 cash, and some days later gave a note signed by Sylvia A. Henderson and herself, for the balance of \$1500.00.

The deed was not delivered at the time of its execution, but with or without a written escrow agreement, was placed in escrow in the Union Bank of Anchorage, Alaska, together with the note, where both remained until shortly before the 4th day of August, 1948 when the balance then due on the note was paid, the deed delivered, and recorded on said date.

On April 30, 1948 the building contract was entered into between Russell W. Smith and Audrey Cutting which is set forth on pages 3, 4, 5, and 6 of appellants' brief.

In the contract Audrey Cutting represents herself as owner but in her amended answer to complaint in intervention filed February 8, 1949 she alleges that she entered into this contract for herself and for and on behalf of Sylvia A. Henderson, a minor.

Audrey Cutting acquired possession of the premises about the middle of July, 1948 and rented them continuously for the rental of \$150.00 a month from that time until sometime after the 8th of April, 1949.

The contract price, \$9800.00, for the erection of the residence was not paid. The contractor claimed the sum of \$700.00 in addition to the contract price for extra work. Audrey Cutting conceded that there was \$200.00 due for extra work, so that there was a disagreement to the extent of \$500.00.

Russell Smith, the contractor, did not demand the sum of \$13,500.00 as stated in appellants' brief but did demand the sum of \$10,500.00.

At all events, nothing was paid on the contract and no amount offered or tendered by Audrey Cutting. The laborers and materialmen acquired liens against the property which they have foreclosed in the manner provided by law and been granted judgment to the amount of their respective claims.

ARGUMENT.

In this action the appellees claimed liens on the premises involved by virtue of the following provisions of the Alaska Code:

“Sec. 26-1-1. ACLA 1949. Persons entitled to lien for work or labor done or materials furnished. Every mechanic, artisan, machinist, contractor, lumber merchant, laborer, teamster, drayman, and other persons performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, fence, machinery or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement, or his agent. (CLA 1913, sec. 691; am L 1933, ch. 118, sec. 1, p. 241; CLA 1933, sec. 1982.)”

To this section should be added section 26-1-14, which, in the Compilation of 1933 was inadvertently omitted, which is as follows:

“Sec. 26-1-14. Persons deemed agent of owner of building or other improvement. Every con-

tractor, subcontractor, architect, builder, or other person having charge of the construction, alteration or repair, in whole or in part, of any building or other improvement as provided in sections 1982 and 1983 (Secs. 26-1-1 and 26-1-8 herein), shall be held to be the agent of the owner for the purposes of this Article (Secs. 26-1-1-26-1-14 herein). (Added, L 1935, ch. 28, sec. 1, p. 79.)”

“Sec. 26-1-2. Land or interest therein subject to lien: Mines: Rights of purchaser of improvement and leasehold. The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the court at the time of the foreclosure of such lien), and the mine on which the labor was performed or for which the material was furnished shall also be subject to the liens created by this code if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the land belonged to the person who caused the building or other improvement to be constructed, altered, or repaired; * * *”.

“Sec. 26-1-4. Notice of non-responsibility. Every building or other improvement mentioned in section six hundred and ninety-one (sec. 26-1-1 herein), constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and

the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this code, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land, or upon the building or other improvement situated thereon. (CLA 1913, sec. 694; CLA 1933, sec. 1986.)”

In this argument the First and Second Points raised by appellants will be discussed together and are as follows:

FIRST POINT RAISED. That the trial Court erred in denying the motion of counsel for defendants to dismiss at the close of plaintiffs’ case on the grounds that the complaints of the original plaintiffs and plaintiff intervenors did not state good causes of action against the defendants.

SECOND POINT RAISED. That the trial Court erred in denying the motion of defendants’ counsel to strike the lien claims filed by plaintiffs and to dismiss at the close of plaintiffs’ case on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

No motion was made by counsel for defendants at the close of plaintiffs’ case. At the conclusion of the trial and after both sides had rested, counsel for de-

fendants moved to dismiss on the ground that the complaints failed to state a cause of action. (TR 558-559.)

As to the second point raised, no motion was made at any time during the trial of the case or thereafter to strike the lien claims filed by plaintiffs and no motion was made at the close of plaintiffs' case, or at any time, to dismiss on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

However, in the First Point raised, the complaints are attacked on the ground that they did not state good causes of action, in that,

First. The complaints did not properly allege the ownership of the property sought to be charged with the liens, and

Second. The complaints did not allege that the work and labor was done at the instance of the owner of the building or his agent. (Brief of Appellants, page 14.)

In the Second Point raised, the lien statements are attacked on the same grounds. (Brief of Appellants, page 17.)

In appellees' brief, the question of the allegation of ownership will be hereinafter discussed.

CONTRACTUAL RELATION.

In substance, appellants' contention is that neither in the claims of lien nor the complaints in support thereof is there any allegation of a contractual relation between the lien claimants and the owner of the property sought to be charged with the lien; that such contractual relation must be alleged in both claims of lien and in the complaints.

While this contention is maintained against all the complaints and complaints in intervention involved in this appeal, in the brief of appellants the argument is directed only to the original complaints, Nos. A-5087 and A-5088. (TR 3-117.)

In each of these complaints and in each cause of action therein, Ralph R. Thomas is designated as the owner of the premises and it is alleged that the construction of the building was "with the *knowledge, consent and at the instance* (italics ours) of the defendant, Ralph R. Thomas". (In Case No. A-5088 the defendant, Thomas, is designated as "Ralph Russell Thomas".) (TR 4, Par. III; 119, Par. V; 122, Par. IV; 125, Par. IV.)

In each of the claims of lien attached to the complaint in case No. A-5088 appears the allegation "that the residence building now on said premises was constructed * * * with the knowledge and consent of the said Ralph Russell Thomas". (TR 130-132-134.)

So it appears that in case No. A-5088 the contractual relation between the owner and the lien claim-

ant is sufficiently stated in both claims of lien and complaints.

In case No. A-5087, however, in which Ray Bullerdick and five other carpenters and laborers join as plaintiffs, the lien claims do not directly allege the contractual relation between the lien claimants and the owner, Ralph R. Thomas, although the complaints do so allege.

ESSENTIALS OF LIEN STATEMENT.

The laws of Alaska provide, Section 26-1-5, Alaska Compiled Laws Annotated, 1949, as follows:

“It shall be the duty of every original contractor, after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person, claiming the benefit under this article, within 90 days after the completion of his contract, or the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by

the oath of himself or of some other person having knowledge of the facts.”

Thus, the statute provides that every lien claimant shall file for record within a specified time a claim containing:

1. A true statement of his demand, after deducting all just credits and offsets;
2. The name of the owner or reputed owner, if known;
3. The name of the person by whom he was employed or to whom he furnished the materials; and
4. A description of the property to be charged with the lien sufficient for identification.

The claim of lien of Ray Bullerdick in case No. A-5087 states, among other things, as follows:

1. That the lien is claimed on certain premises in the City of Anchorage, Alaska, describing them, together with the building thereon situated;
2. That the lien is claimed for certain labor performed on said premises in the construction of a building thereon, detailing when the work was performed, the number of hours labor and agreed wage, and the amount owing claimant after deducting all just credits and offsets;
3. That the owners and reputed owners of said premises are Ralph Russell Thomas and Audrey Cutting; and

4. That the claimant was employed by Russell W. Smith to perform said services at the agreed wage above mentioned.

The foregoing is a literal compliance with the terms of the statute as to all four essential averments required.

In case No. A-5087 five other laborers and carpenters joined in the action with Ray Bullerdick; and in their complaints adopt all of the allegations of the Bullerdick complaint which are common to all their causes of action and then set forth their particular claims and all of their claims of lien and complaints in support thereof are identical in form with that of the plaintiff, Bullerdick. (TR 3-26.)

In attacking the sufficiency of these complaints, counsel for appellants relies solely upon *Russell v. Hayner*, 130 Fed. 90, but arrives at a mistaken conclusion as to what was actually decided in that case, which was, in effect, that a contractual relation between the owner of the building and the lien claimant must be alleged in the complaint. The case does not hold that this contractual relation must be alleged in the lien statement but holds as follows:

“It does not appear from the complaint that the owners of the lot had any knowledge of the contract made by Hayner with appellants for the construction of the building, or that it was constructed at their instance. In order to bring the case within the provision of Section 265 of the Alaska Code (now 26-1-4 ACLA, 1949) it was

necessary for the appellants to have alleged in the *complaint or lien* (italics ours) that the building was constructed upon the land 'with the knowledge of the owner or the person having or claiming any interest therein', for it is only in such cases that this section provides that it shall be held to have been constructed 'at the instance of such owner or person or persons having or claiming any interest therein' unless the owner gives the notice therein prescribed and this notice is not required to be given until after the owner shall have obtained knowledge of the construction of the building."

Furthermore, the opinion in *Russell v. Hayner* further states, 130 Fed. 94:

"The fact is that appellants were given the opportunity to amend their complaint, and, if there were any material facts which would show knowledge on the part of the owners of the lot, etc. they should have amended their complaint to show such facts to the court".

Thus, indicating that any failure to establish the contractual relation between the lien claimant and the owner could have been remedied by an amendment of the complaint as stated above.

In *Russell v. Hayner*, supra, the Court cites *Cross v. Tscharnig*, 39 Pac. 540, in support of its decision and quotes that case as expressly holding:

"That a mechanic's lien claim which states that the material was furnished to one person, and that the land was owned by another, but does not state

that the material was furnished at the request of the owner is fatally defective.”

This exact language is used in the syllabus to the opinion in *Cross v. Tscharnig* but nowhere appears in the opinion.

The opinion in *Cross v. Tscharnig* does state:

“So we have here both the claim of lien and the complaint, which concurrently show that the materials were furnished at the instance of a person other than the owner of a building, to-wit: Kasper Tscharnig. There exists no statement or allegation anywhere, *either in the claim of lien or in the complaint* (italics ours) that H. W. Ross, the owner of the building, caused the materials to be furnished or that the same, or any part thereof, were furnished at his instance or request * * * It would seem therefore, that the complaint is insufficient to support the liens in this respect.”

So that in both *Russell v. Hayner* and *Cross v. Tscharnig*, supra, the demurrers to the complaint are sustained on the ground that in neither complaint or lien statements is any contractual relation alleged between the owner and the lien claimant.

Furthermore, the weight of authority supports the view that such contractual relation need not be alleged in the lien statement provided it is alleged in the complaint. The lien statute of Alaska is taken almost in toto from the Oregon statute. Hills Annotated Code, Section 3673.

Cross v. Tscharnig, supra, is an Oregon case. The opinion was written by Judge Wolverton, who wrote the opinion in *Osborne v. Logus*, 42 Pac. 997, and in the latter case carefully reviews the authorities and concludes, page 1001:

“The object of the statute is to provide a ready and available means whereby contractors, subcontractors, and materialmen may secure themselves for labor done or material furnished in the construction and repair of buildings and other structures, and at the same time to furnish the owner with a reasonable notice, so that he may deal with contractors to whom he is personally liable accordingly.

Whether the person for whom the labor is done or to whom the materials were furnished was an agent under this statute or had authority to bind the owner and entitle the laborer and materialmen to a lien is a matter of pleading and proof at the trial.”

Among other authorities cited by Judge Wolverton as sustaining this interpretation is *Lumber Company v. Gottschalk*, 22 Pac. 860 (California case) in which the Court states on page 862 of the opinion:

“There is nothing in the section or any other that requires the materialman to state in his claim of lien what relation the person to whom he furnished the material bore to the owner—whether contractor or agent. Nor does the burden of determining whether any contract made or attempted to be made by the owner or the contractor was valid or not rest on him when he comes to file his lien. He must state the facts re-

quired by statute. Whether the person to whom he furnished the material had authority to bind the owner and entitle the materialman to a lien is a matter of pleading and proof at the trial.”

The Supreme Court of the United States in *Springer Land Ass’n. v. Ford*, 168 U.S., page 525; 18 Supreme Court Reporter, 175, affirming a New Mexico case, reported in 41 Pac. 541, approves the above language.

In *Drake Lumber Co. v. Lindquist* (another Oregon case decided in 1946), 170 Pac. (2d) 712, the Court states on page 719 (11):

“Our statute (Sec. 67-105 O.C.L.A.) unlike the statutes of many states does not require that the contractual relations existing between the lien claimant and the owner shall be stated in the notice of lien.” (Citing *Osborne v. Logus*, supra, and *Collins v. Heckart*, 270 Pac. 907 (Ore case).)

In the latter case, discussing this precise question, the Court states, page 910:

In some jurisdictions the statute requires that the contract be described in the notice. Our statute, however, makes no such requirement. It prescribes the necessary elements to be set out in a claim of lien and this court has time and again held that it is unnecessary to set out in the notice anymore than the statute itself requires.” Citing *Osborne v. Logus*, supra, and other Oregon cases.

The brief of appellants does not discuss the pleadings and lien claims of the intervening plaintiffs and

defendants, the argument being directed only to the complaints in the original suits.

The intervenors concerned are:

1. Kennedy Hardware (Complaint, TR 181—Claim of Lien, TR 187).
2. Ken Hinchey Company (Complaint, TR 45—Claim of Lien, TR 58).
3. Wolfe Hardware and Furniture (Cross-Complaint, TR 200—Claim of Lien, TR 214).
4. Anchorage Sand and Gravel, including an assigned claim of Cinder Concrete Products Company (Complaint, TR 163—Claims of Lien, TR 176-178).
5. Ketchikan Spruce Mills and Alaska Plumbing and Heating Company, joining in one action (Complaint, TR 152—Claims of Lien, TR 150-161).

In the Kennedy Hardware case the complaint alleges, “that said construction was with the knowledge, consent and at the instance of the defendants, Audrey Cutting and Ralph Russell Thomas” (TR 183, Par. VI), and in the claim of lien it is alleged, “the residence building was constructed with the knowledge and consent of the said Russell Thomas”. (TR 188.)

In Ken Hinchey Company, the claim of lien states, “that the residence building now on said premises was constructed with the full knowledge and consent of the said Ralph Russell Thomas”. (TR 59.) This claim of lien is attached to the complaint and made a part thereof. (TR 54, 55, Par. XXI.)

In Wolfe Hardware and Furniture, likewise, the claim of lien contains the same allegation as that of the Ken Hinchey Company and is made a part of the complaint. (TR 210, Par. XXI—TR 215.)

Both the complaints and claims of lien in these three cases last discussed certainly meet the objections of the appellants as to the allegation of contractual relation.

Anchorage Sand & Gravel and Cinder Concrete Products Company:

In this case, as in the original case, No. A-5087, the claim of lien does not directly allege the contractual relation between the lien claimant and the alleged owner, Ralph Russell Thomas.

The claim of lien, however, does clearly set forth all the four essentials hereinbefore enumerated as required by the Alaska Statute. (TR 176-178.)

Also, the complaint in this action does not directly allege the contractual relation, but this omission is remedied by the order of the Court made at the conclusion of the case permitting the pleadings of intervenors to be amended “to the effect that the work done and materials supplied were done and supplied at the instance of the owner and record owner, Ralph R. Thomas”. (Supplemental TR, page 582.)

Ketchikan Spruce Mills, Inc. and Alaska Plumbing and Heating Company, Inc.:

In this action, as in the last previous action discussed, the claims of lien substantially set forth the

four essential averments heretofore enumerated, as essential in a claim of lien; any omission in the complaint to allege the contractual relation between the lien claimants and the owner of the property sought to be charged is cured by the order of the Court permitting the amendment above quoted.

Also, at the conclusion of the trial, on motion of counsel for Ketchikan Spruce Mills, the notice of lien of that claimant was amended to include the name of Ralph Russell Thomas as an owner or reputed owner. This amendment was allowable by virtue of the provisions of Section 26-9-5, ACLA, 1949.

From the foregoing it appears that in all the claims involved the lien claims set forth the four essentials required by statute.

That in all complaints, either originally or by proper amendment, the contractual relation between the lien claimant and owner of the property sought to be charged with the lien is alleged.

ALLEGATION OF OWNERSHIP.

On this point appellants again rely solely on *Russell v. Hayner*, 130 Fed. 92, where the Court comments as follows:

“There is no direct averment in the complaint, nor any positive statement in the lien, as to the owner of the building”,

and intimates, but does not decide, that the complaint may be defective on account of this omission.

In the present case no such question arises. All of the liens are claimed against both the building and the land, and the allegation of ownership is directed to both.

In original cases A-5087 and A-5088 the lien claims allege that Ralph Russell Thomas and Audrey Cutting are the “owners and reputed owners”. Likewise, in the Kennedy Hardware Intervention.

In Anchorage Sand and Gravel Co. and Cinder Concrete Products Co. Audrey Cutting and Ralph Russell Thomas are named as “owners or reputed owners”.

In Wolfe Hardware and Furniture and Ken Hinchey Co. Ralph Russell Thomas is named as owner or reputed owner.

In Alaska Plumbing and Heating Co., Inc., Audrey Cutting, Russell Smith, and Ralph Russell Thomas are named as owners or reputed owners.

In Ketchikan Spruce Mills, Inc., Audrey Cutting, Russell Smith and Sylvia A. Henderson are named as “owners or reputed owners”, and the name of Ralph Russell Thomas was later added by amendment. (TR 572.) This under authority of Sec. 26-9-5, ACLA, 1949.

In *Ford v. Springer Land Ass’n*, 41 Pac. 545, *supra*, a claim of lien naming certain persons as “owners or reputed owners” is upheld, and the Supreme Court sustains this holding in *Springer Land Ass’n v. Ford*, stating:

“The names of the owners or reputed owners of the lands, and their connection with the transac-

tion, are stated with sufficient clearness''. (168 U.S. 525, 18 Sup. Court Rep. 175.

A mechanic's lien, under the Alaska law, is acquired by the labor done or material furnished, not by filing the claim for record.

The filing is for the purpose of securing and perpetuating the lien, and is designed to give notice to all the world, including owners, incumbrancers, and purchasers, that a lien is claimed against the property.

Here the evidence showed that Ralph Russell Thomas was the record owner of the premises until August 4, 1948, long after the liens had been acquired, and Audrey Cutting was the reputed owner and had taken possession of and was receiving rents for the property in July, 1948.

Both were named as defendants in the title to all the lien claims filed.

The property was designated by legal description in all claims.

The liens were all claimed against both land and building.

All essential averments of claims of lien are clearly stated, and no one interested in examining the record could be misled.

As stated by Chief Justice Fuller in *Ford v. Springer Land Ass'n*, supra:

“Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effect its object.

Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the 'test of such compliance is to be found in the statute itself' ". 168 U.S. 524, 18 Sup. Ct. Rep. 174.

THIRD AND TENTH POINTS RAISED.

THIRD POINT RAISED. That the trial Court erred in denying the motion of defendants' counsel to dismiss against the defendant, Audrey Cutting, on the grounds that she was neither owner of the property nor agent of the owner, Sylvia A. Henderson.

There was no motion made by defendants' counsel to dismiss against the defendant, Audrey Cutting, on the grounds above stated.

TENTH POINT RAISED. That the trial Court erred in rendering personal judgment against the defendant, Audrey Cutting, who was neither owner nor agent of the owner of said real property.

In discussing this point counsel for appellants makes the misstatement, on page 18 of appellants' brief, "that sole title to the property was vested in Sylvia A. Henderson, a minor, during and at all times referred to in the complaint and thereafter". This contention is at variance with the testimony and findings of the Court but is nevertheless persistently repeated throughout the brief of appellants.

Audrey Cutting is made a defendant in all the Complaints and Complaints in Intervention by virtue of

the third subdivision of Section 26-1-13, ACLA, 1949, which reads as follows:

“Parties: Conformity to mortgage foreclosure proceedings. In all actions to enforce any lien created by this chapter (Secs. 26-1-1-26-1-14 herein) all persons personally liable and all lien holders whose claims have been filed for record under the provisions of section six hundred and ninety-five (Sec. 26-1-5 herein) shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may be made parties, but such as are not made parties shall not be bound by such proceedings. The proceedings upon the foreclosure of the liens created by this code shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property. (CLA 1913, Sec. 699; CLA 1933, Sec. 1994.)”

The procedure for the foreclosure of mortgages and other liens on real property is prescribed in Section 56-1-31 and Section 56-1-34, ACLA, 1949 which are as follows:

Sec. 56-1-31: “A lien upon real property other than that of a judgment, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by an action of an equitable nature. In such action, in addition to the judgment of foreclosure and sale, if it appears that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person

as principal or otherwise, the court shall also adjudge a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of any ordinary judgment for the recovery of money. (CLA 1913, Sec. 122; CLA 1933, Sec. 3897.)”

Sec. 56-1-34: “The judgment may be enforced by execution as an ordinary judgment for the recovery of money, except as in this section otherwise or specially provided:

* * * * *

Second: When the judgment is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the judgment as to the sum remaining unsatisfied to either, the judgment may be enforced by execution as in ordinary cases. When in such case the judgment is in favor of different persons not united in interest, it shall be deemed a separate judgment as to such persons, and may be enforced accordingly. (CLA 1913, Sec. 1224; CLA 1933, Sec. 3900.)”

The Court found from the evidence in this case that the Anchorage Sand and Gravel Company acquired a lien upon the premises involved in the sum of Three Hundred Seventy-seven and 61/100 Dollars (\$377.61) and that the Ketchikan Spruce Mills, Inc. acquired a lien against said premises in the sum of Two Thousand Seven Hundred Seventeen and 86/100 Dollars (\$2,717.86) and that both liens were for labor or materials furnished in the construction of the building

at the request of the defendant, Audrey Cutting, and that both claimants are entitled to judgments for said amount against the defendant, Audrey Cutting, and judgment was rendered accordingly.

The pleadings of the intervenors above named were amended by order of the Court "to the effect that the work done and the materials supplied were done and supplied at the instance of the owner and record owner, Ralph R. Thomas".

The Court found that the proof sustained this allegation and also that the proof sustained the allegation in the intervenors' complaints that the labor done and material furnished was at the request of Audrey Cutting. Consequently, the judgment against her for the amount of the respective liens above referred to was proper and in accordance with the findings of the Court.

In the *Russell v. Hayner* case, supra, again relied upon by counsel, the Court held that the cause of action for foreclosure failed because the complaint did not state a cause of action, which left the personal action standing alone, independent of the proceedings in equity to foreclose the lien. In this situation the Court in the *Hayner* case relegated the plaintiff to an action at law to recover the personal judgment, although the above-quoted Alaska statute seems to indicate that a contrary cause might have been pursued.

In the present case, however, no such situation exists, the liens have been upheld and foreclosed and the

personal judgment against the defendant, Audrey Cutting, allowed as clearly provided by statute.

FOURTH POINT RAISED. That the trial Court erred in amending *sua sponte* and by judgment the pleadings of plaintiffs to contain other essential allegations not previously set forth therein.

SIXTH POINT RAISED. That the trial Court erred in amending *sua sponte* and by judgment the complaints of the plaintiffs sufficient to make good cause of action.

What is meant by the phrase, "and by judgment", in the foregoing statement of points is not understood by counsel for appellees. There were no pleadings amended by judgment.

The pleadings in the original cases Nos. A-5087 and A-5088 were not amended in the respects indicated by brief of appellants, nor at all. Nor does the brief of appellants state the amendment allowed, and complained of which was clearly stated in the supplemental transcript of record, page 582, as follows:

"The pleadings filed on behalf of plaintiffs are in all respects adequate. The other pleadings filed on behalf of certain intervenors may be considered as amended to conform with the proof. Those amendments so far as the intervenors' pleadings are concerned, are to the effect that the work done and materials supplied were done and supplied at the instance of the then and record owner, Ralph R. Thomas. That averment, or one equivalent to it, is contained in the original complaints in

each action and it will be considered that any of the defendants may have denied that averment”.

The pleadings affected by this amendment were the Complaints in Intervention of the Ketchikan Spruce Mills, Inc. and Alaska Plumbing and Heating Company (TR 152) and the Anchorage Sand and Gravel Company. (TR 163.)

The answer of Audrey Cutting to the complaints in the original cases, A-5087 and A-5088, contains the following allegation:

“Admits that she is the owner of that certain real property situate in the City of Anchorage, Alaska and more particularly described as: Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the City of Anchorage, Alaska, according to the official map and plat thereof on file in the office of the Recorder for the Precinct of Anchorage, Third Division, Territory of Alaska.” (TR 27, 138.)

These answers were sworn to by Audrey Cutting and filed September 9, 1948 and stood as her answers until February 14, 1949 and February 18, 1949.

In the meantime, the Complaints in Intervention which the Court allowed to be considered amended were filed respectively, on November 9th and November 12, 1948, at which time the original answers of Audrey Cutting, in which she admitted ownership of the subject property, were her only pleadings on file, and it was her repudiation of this allegation in the said subsequent amended pleadings which made neces-

sary the amendments of intervenors' pleadings of which she, through her counsel, now complains.

Had she not repudiated her admitted ownership of the premises in controversy the intervenors' complaints would have stated a cause of action without amendment.

The brief of appellants on the above points again invokes the standards of pleading set forth in *Russell v. Hayner, supra* (Brief of Appellants 22) but overlooks the fact that the opinion in that case, 130 Fed. 94, states:

"That fact is that appellants were given the opportunity to amend their Complaints and if there were any material facts that would show knowledge on the part of the owner of the lot, etc. they should have amended their complaint so as to properly present such facts to the Court".

In the *Hayner* case the amendment was not made necessary by any act of the defendant, but in the present case it was the defendant, Audrey Cutting's, repudiation of her own sworn answer which made the amendment necessary and proper.

FIFTH POINT RAISED. That the trial Court erred in amending the plaintiffs' pleading *sua sponte* and by judgment to include defendant, Sylvia A. Henderson, as a party defendant.

In his argument on this point counsel for appellants quotes the statement of the Court appearing in the supplemental transcript, page 583 (Appellants' Brief 24), and states that in the language quoted,

“The Court erroneously makes Sylvia A. Henderson a defendant and amends all of the pleadings to show that Sylvia A. Henderson claims some title or interest in the property adverse to the plaintiffs and intervenors”.

In the second amended answer hereinbefore referred to filed February 14, 1949 counsel for appellants assumes to appear for the defendants, Audrey Cutting and Sylvia A. Henderson, and there appears in said answer for the first time in any pleading of the defendant the allegation in which sole ownership of the premises in controversy is alleged to be in Sylvia A. Henderson. (TR 61, Par. II 62.)

Also on February 18, 1949 after the trial was concluded counsel for appellants filed a third amended answer in which counsel again assumes to appear for both defendants and again alleges the sole ownership of the premises to be in Sylvia A. Henderson and also denies any ownership in the defendant, Audrey Cutting. (TR 65, 66.) It was to meet these new allegations contained in pleadings filed late during the trial that the Court permitted the amendments of which the appellants complain.

The plaintiffs in the original cases, A-5087 and A-5088 met these amended answers by reply alleging substantially what the Court permitted by the amendment of which counsel for appellants now complains. (TR 68, 69.)

All the other intervenors met the allegation of sole ownership in Sylvia A. Henderson by their respective

replies to the amended complaints in which they deny this allegation. (TR 67, 70, 63, 219.)

Consequently, there could not possibly have been any error in the action of the Court in permitting the amendment in this cause.

Sylvia A. Henderson was not made a defendant by the amendment referred to on page 24 of appellants' brief but was referred to as a defendant for the reason that some of intervenors' pleadings had referred to her as a defendant and because in the amended answers filed by counsel during the trial and after the trial counsel for appellants designated her a defendant and assumed to appear for her as attorney.

As to the question of including Sylvia A. Henderson as a party defendant in the judgment, that also was brought about by the act of counsel for appellants in assuming to appear for Sylvia A. Henderson and filing the amended pleadings alleging sole ownership of the premises in controversy in Sylvia A. Henderson. Whether the judgment of the Court on the case is binding on Sylvia A. Henderson is the subject of argument on other points raised by appellants and this question will be fully discussed in answering the argument of appellants on those points.

EIGHTH POINT RAISED. That the trial Court erred in allowing the lien claims against the real property of an infant, the said Sylvia A. Henderson, and

NINTH POINT RAISED. That the trial Court erred in ordering sold, by its judgment, the real property of Sylvia A. Henderson, a minor.

The argument of counsel for appellants on the Eighth and Ninth Points raised is based on the following proposition stated on page 28 of appellants' brief, as follows:

“There can be no mechanic's lien upon the lands of a minor, for he can make no contract which is binding upon himself or his property * * * even if there be a contract with his guardian for erecting a building upon a minor's property, no lien is conferred if the guardian had no authority in law to make the contract.”

And on the following stated on page 29 of the appellants' brief:

“Where a mechanic performs work upon the property of a minor under a contract with the guardian the mechanic's lien cannot be enforced where the guardian has not obtained an order of the court authorizing her to do the work.”

The appellants contend that the two above propositions have no bearing upon the right of the Court to allow and foreclose the liens involved in this case.

The contention of the appellees is that the liens allowed and foreclosed in this case were not allowed and foreclosed against the property of a minor.

None of the argument or authorities cited by counsel for appellants on these points is relevant to the question involved.

It is conceded that at the time the liens were acquired by the claimants that the deed of the property from Ralph R. Thomas to Sylvia A. Henderson was

not recorded. The only question involved on the point under discussion is the construction of Section 26-1-3, ACLA, 1949. The part of said section which is pertinent is as follows:

“A lien created by this code upon any parcel of land shall be preferred to any lien, mortgage or other incumbrance which may have attached to the land subsequent to the time when the building or other improvement was commenced, or the materials were commenced to be furnished or placed upon or adjacent to the land; also to any lien, mortgage or other incumbrance which was unrecorded at the time when the building, structure, or other improvement was commenced, etc.”

It is the construction of the word “incumbrance” in the above statute that is material in determining the right of the Court to foreclose the liens against, not the property of Sylvia A. Henderson, a minor, but against the property described in the lien claims on which the liens were acquired before Sylvia A. Henderson recorded her deed.

The section above quoted is in the nature of a recording act. It extends its protection to persons who have furnished labor or material in the construction of buildings or other improvements as against unrecorded mortgages or other incumbrances. It cannot be contended that if Sylvia A. Henderson had acquired a mortgage on the premises in dispute and failed to record it until after a lien had been acquired against the mortgaged property that she would not have been subject to the operation of the above quoted

statute for it must be conceded that the recording acts apply to all persons, infants as well as others.

In discussing this question under the Fourteenth Point raised, with reference to which it has no relation, the counsel for appellants cites a long array of definitions of the word "incumbrance" taken from Bouvier's Law Dictionary (Appellants' Brief 65, 66) and counsel argues that in view of these definitions the Alaska Legislature did not intend that the phrase "and other incumbrances" was to include a deed. No case can be cited which limits the meaning of the word "incumbrance" to the definitions quoted by counsel. On the contrary, every case that counsel for appellees has been able to find construes the term "incumbrance" in connection with mechanic's lien laws as including a deed or conveyance.

The Supreme Court of Kansas in construing a statute very similar to the statute of Alaska states:

"Mechanic's Lien—Priority—and Other Incumbrances—Deeds.

"Under the provisions of Article 27 c. 80, Comp. Laws, 1879, the lien of a mechanic or materialman for work done or material furnished has preference to 'all other liens and incumbrances' which may attach to or upon the lands or buildings subsequent to the commencement of the building or the making of the repairs, or the furnishing of the material; and the words of the statute 'all other liens and incumbrances' also embraces conveyances". *Warden v. Sabins*, 12 Pac. 520. (Syllabus by the Court.)

The statute above referred to is substantially the same as the first part of the statute of Alaska heretofore in the argument on this point quoted. The statute of Kansas did not include the provision of the Alaska law referring to prior and unrecorded incumbrances but the meaning of the word in each case would necessarily be the same.

In the opinion in the Kansas case the Court states, page 522:

“The word ‘incumbrance’ is a broader term than ‘lien’, and yet, when the statute of Indiana only provided that ‘liens created’ shall relate to the time when the person furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter, etc., the Supreme Court of that state decided the lien of the mechanic related to the time when the work commenced, or the materials began to be furnished, as to ‘subsequent conveyances’ as well as to other liens”. *Fleming v. Bumgarner*, 29 Ind. 424.

“The same question was before the Indiana Court in *Kellenberger v. Boyer*, 37 Ind. 188. The Court followed the decision in *Fleming v. Bumgarner*, and said the ‘construction given to the statute in that case would not extend the operation of the act beyond its evident spirit and the legislative intention’ (and the Kansas case continues) ‘An incumbrancer is one who has a legal claim upon an estate, and the purchaser of premises under a conveyance is the holder of the legal estate. *An absolute conveyance is an incumbrance in the fullest sense of the term.*’ (Italics ours.)

“We do not think, therefore, that the preference given to the lien contractor or materialman which operates ‘over all liens and incumbrances’ is confined solely to subsequent liens or mortgages but also embraces ‘conveyances’. In adopting this rule no injustice is done to the purchaser as the work itself or the material furnished is notice to all of the mechanic’s or materialman’s claims.”

In the present case the statute involved relates both to the land and buildings, both prior and subsequent to the commencement of the construction, but the correct interpretation of the term “incumbrance” in the foregoing decision is equally applicable to both.

“In Section 5480 it is provided: That ‘the lien for the things aforesaid’ or work shall attach to the buildings, erections or improvements for which they are furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same are put’. ‘Incumbrance’ is here evidently used in its enlarged sense if of legal title to the land.” *Pinkerton v. LeBeau*, 54 NW 99, 3 S. Dak. 440.

“A paramount outstanding title is an ‘incumbrance’ within the meaning of a covenant against incumbrancers.” *Morris v. Short*, 151 SW 639.

“Materialman’s Lien. Such lien is superior to the lien or rights of an incumbrancer which includes a person who purchased the land between the time the building was commenced and the furnishing of the material.” *Sherbondy v. Tulsa Boiler and Machinery Co.*, 226 Pac. 566.

“A conveyance is to be regarded as an ‘incumbrance’ ”. *Continental Supply Company v. White*, 12 Pac. (2d) 569.

In *Bloom on the Law of Mechanic's Liens*, Sec. 490, page 449, appears the following:

“It will be noticed that the provisions of Section 1186 do not expressly mention grants and conveyances of real property, but, under the general principles of priorities, which have their enunciation in the Civil Code, it is thought that these liens take precedence over subsequent ‘grants’ and ‘conveyances’, and also over prior unrecorded grants and conveyances, although the section expressly refers only to ‘liens, mortgages, and other encumbrances’.”

The decisions and authorities above cited and quoted are all exactly in point as regards the interpretation of the word “incumbrance” as used in connection with priorities and mechanic's lien laws and diligent search has failed to disclose to counsel for appellees, any case to the contrary.

Section 22-3-25, ACLA 1949, is as follows:

“Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property or any portion thereof, whose conveyance shall be first duly recorded.”

No one would contend that this section is not applicable to a minor or infant. Appellees contend that whatever interest Sylvia A. Henderson, a minor, may have owned in the premises in controversy by virtue of having an unrecorded deed at the time the lien claims were acquired was at the time of the commencement of the work or furnishing of materials inferior to the interest of the lien claimants, that as against lien claimants to the extent of the amount of their lien claims she had no interest. That her interest was void as against the lien claimants just as an unrecorded deed in her hands would have been void against an innocent purchaser for value whose deed was first recorded. That regardless of counsel's contention that a lien claimant is not an innocent purchaser for value in the sense of the general recording act above quoted that nevertheless, to all intents and purposes, a lien claimant stands in the position of an innocent purchaser with respect to a deed unrecorded at the time he acquires his lien. If this were not true then any person could defeat the spirit and intention of the mechanic's lien law by purchasing property in the name of an infant daughter, keep the conveyance secret, and after procuring the construction of valuable buildings on the premises and by subsequently recording the secret instrument, defeat the claims of all laborers and materialmen and escape all personal responsibility, a result which the evidence in this case seems to indicate is precisely what the defendant, Audrey Cutting, is attempting to accomplish.

Under the provisions of Section 26-1-3 ACLA, 1949 hereinbefore set forth, a mechanic's lien claim when filed relates back and takes effect from the time of the commencement of the work done or materials furnished. It has been assumed in this argument that at the time the liens of the claimants were acquired Sylvia A. Henderson had an unrecorded deed to the premises in controversy. The appellees do not concede this to be a fact, but on the contrary, contend the deed in question had not even been delivered to Sylvia Henderson until at least several weeks after the residence building had been completed.

This question of the time of delivery of the deed is raised by counsel for appellants by his Fourteenth Point raised and as this question may have some relevancy to the point now under discussion it will next be discussed in this brief.

FOURTEENTH POINT RAISED. That the trial Court erred in finding against the evidence that there was no delivery of the deed of the real property from Ralph Thomas to Sylvia A. Henderson, and

FIFTEENTH POINT RAISED. That the trial Court erred in finding against the evidence, that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas on said real property.

As the argument on the Fourteenth Point involves a discussion of the evidence and as the evidence on this point consists wholly of the testimony of the

defendant, Audrey Cutting, appellees will at this point insert portions of the testimony of Audrey Cutting, together with some comments of counsel for appellees, relevant to this issue, and also other parts of her testimony which will assist this Court in determining how much credence, if any, should be attached to any of her uncorroborated testimony.

EXTRACTS FROM TESTIMONY OF AUDREY CUTTING.

On February 8, 1949 Audrey Henderson Cutting was called as a witness by the plaintiffs. Her attention was called to the contract between herself and Russell W. Smith which is set forth in full on pages 3 to 6 of the brief of appellants and she testified as follows:

“Q. (by Mr. Grigsby). I want to ask you Mrs. Cutting, this contract purporting to be signed on the 30th day of April, were you at that time the owner?

A. It would depend on how you would look at it. I bought the lot for my minor daughter, as the guardian I would be the owner.

Q. But in dealing with the various people, including this contractor, Smith, and the people who furnished materials for that building did you represent yourself as owner?

A. I was representing both myself and my daughter.

Q. Prior to the construction of that building did you apply for a building permit from the City?

A. I believe Mr. Smith applied for the building permit.

Q. You have seen it?

A. Yes.

Q. You were designated as owner?

A. That is correct.

Q. You were at that time the reputed owner as far as the job was concerned?

A. Yes.

Q. But your daughter was the real owner?

A. That is correct and I was her guardian.

Q. And in your answer you state in paragraph I—you admit that you are the owner of certain real property situated in Anchorage, Alaska, and particularly described as: Lot 2 in Block 37-D, South Addition of the Original Townsite of Anchorage?

A. That is true.

Q. And for all purposes you were what is considered as the owner of the property?

A. That is correct.” (TR 254-255.)

“Q. (by Mr. Kay). Mrs. Cutting, in paying for this lot did you pay for it on a so-called real estate contract?

A. Yes.

Q. That was a contract with Ralph Russell Thomas?

A. That is correct.

Q. Do you have a copy of that contract?

A. I believe there is a copy in the Union Bank.

Q. Was the deed placed in escrow in connection with that contract?

A. That is correct.

Q. Could you state whether that is a contract between you and Mr. Thomas or how was it?

A. The contract was between my daughter and Mr. Thomas.

Q. And was it signed by you?

A. No.

Q. It is your testimony that a deed is placed in the Union Bank. Do you have a copy?

A. No, I do not." (RT 255.)

On February 9th called as a witness by her counsel Audrey Cutting testified among other things:

"Q. You had had some dealings in connection with Lot number 2 in Block 37-D, South Addition to the Original Townsite of Anchorage and you had entered into a contract previously to purchase that lot?

A. Yes.

Q. Did you enter into that personally or was it with Sylvia Henderson?

A. I can't remember. It seems that it was with her.

* * * * *

Q. Was there a deed executed at the time the contract was made?

A. That is correct. The deed was in escrow and put with the bank.

Q. Which bank?

A. Union Bank.

Q. You made the payments?

A. Yes.

* * * * *

Q. You made the payments then without default?

A. Yes.

Q. Was there a default clause?

A. Yes.

Q. What did it provide?

A. It said that in case of default the lot would go back to the original owner.

* * * * *

Q. Mrs. Cutting, do you recall the date you completed payment for the property?

A. The contract was paid in full on approximately July 1, 1948.

Q. *You then received delivery of the deed?*
(Italics ours.)

A. That is correct.

Q. In whose name is the deed?

A. Sylvia A. Henderson.

* * * * *

Q. You have the deed?

A. Yes, I do.

Q. Do you recognize it as a deed which was placed in escrow and executed at the time of the contract?

A. Yes.

Q. Was that deed ever recorded?

A. The deed was recorded on August 4, 1948 at two twenty P.M.

Q. Who recorded the deed?

A. Rose Walsh.

Q. You delivered the deed for recording?

A. I did.

Q. It was done at your request?

A. That is correct.

Q. Had you previously received this deed from the bank?

A. Yes, sir. (TR 339-342.)

Up to this point Audrey Cutting has testified positively and without hesitation both when examined by her own counsel and plaintiffs' counsel that acting as guardian for her minor daughter she made a contract with Ralph R. Thomas for the purchase of a lot; that a deed was executed from Thomas to her daughter and that both the deed and contract were placed in escrow with the Union Bank; that the contract contained the usual forfeiture clause in case of default in payments, that in case of default in payments the lot was to go back to the owner.

Later in the case it seems to have dawned upon her that delivery of an instrument in escrow conveys no title and also that the time when the deed to Sylvia A. Henderson was delivered might be of some importance. At all events, on February 14th, after several days' recess, we find Audrey Cutting testifying as follows:

Q. (by Mr. Butcher). Now, Mrs. Cutting, you were not certain previously when you testified as to the manner of the acquisition of this property and you informed counsel and the Court that you would endeavor to make a search for the papers which were executed in connection with the case, other than the deed, were you successful in finding any papers?

A. Yes, I was.

Q. What did you find?

A. I found the note that was executed for \$1500.00 and I found the copy of the mortgage.

Q. Copy of a mortgage? Did the finding of the copy of that mortgage refresh your memory as to what actually happened in connection with the purchase of that lot and if so, what?

A. Well, finding the copy of the mortgage made me realize that it wasn't a real estate contract so therefore it should be a note so I went through all my papers again and found the income tax receipts.

* * * * *

Q. I hand you this paper and ask you to tell me what it is if you know.

A. It is a copy of the mortgage.

Q. Mortgage between whom?

A. Between Sylvia A. Henderson and Ralph R. Thomas.

Q. And do you know what that mortgage was given for?

A. It was a mortgage on Lot 2, Block 37-D of the South Addition.

* * * * *

Q. Now was this mortgage executed after the deed was signed and delivered?

A. Well, as I recall they were executed both at the same time.

Q. What do you recall about the transaction and circumstances, if you can? Where did it occur and

what was the circumstances surrounding the signing of these papers and the issuance of the mortgage, if you remember?

A. Well, the deed was signed first and then the mortgage.

Q. The deed was signed first by Mr. Thomas?

A. Yes.

Q. Do you recall where it was signed?

A. It was signed in the law office of McCutcheon and Nesbett.

Q. And then this mortgage was prepared?

A. Yes.

Q. Who prepared the mortgage, if you recall?

A. Both Mr. McCutcheon and Nesbett." (TR 409-413.)

And after introduction in evidence of a purported unexecuted copy of a mortgage and the note for which it was supposed to have been given as security, Audrey Cutting proceeds to testify as follows:

Q. (by Mr. Butcher). Now, Mrs. Cutting, I believe you said that this was drawn up for you in the office of McCutcheon and Nesbett?

A. Yes, sir.

Q. And it was signed in that office?

A. Yes, sir.

Q. And it was notarized in that office?

A. Yes, sir.

Q. And prior to the signing of this mortgage do you recall whether the deed was delivered to Sylvia Henderson or not?

A. Yes, but all of the papers were left in escrow in the bank.

(Comment: This does not seem to suit counsel for appellants as appears by the next question.)

Q. Well, you answer my question. In the McCutcheon office was there a delivery made of the deed?

(Objection and objection overruled.)

Q. (by Mr. Butcher). When these papers were executed in the McCutcheon law office was there a delivery of the deed to Sylvia Henderson?

A. Where was.

(Comment: Which answer is completely satisfactory.)

Q. And following that I believe you testified that Sylvia Henderson executed this mortgage?

A. Yes, sir.

Q. And she signed this?

A. Yes, sir.

Q. And she signed the note?

A. Yes, sir.

Q. And then who took possession of the papers?

A. Well, I don't just recall. They were left in Mr. McCutcheon's office.

Q. And do you know what happened to them after that?

A. They were put in the Union Bank for collection.

Q. And they remained there until the note was paid off?

A. Yes, sir.

Q. And then you received all the papers?

A. Yes, sir.

Q. And do you recall whether you received the original mortgage or not?

A. They said they gave me all of the papers that were in the file so I naturally took it for granted that I had the original mortgage." (TR 420-421.)

* * * * *

Cross-Examination by Mr. Grigsby.

Q. (by Mr. Grigsby.) Mrs. Cutting, now with reference to this transaction, acting for Sylvia Henderson you arranged with Ralph R. Thomas to buy this property for the sum of \$1800.00?

A. Yes, sir.

Q. \$300. down and the balance of payments of \$50 per month?

A. Yes, sir.

Q. And you gave them a note for the balance of \$1500?

A. And the mortgage.

Q. What is that?

A. And the mortgage.

Q. And a mortgage to secure that note and he gave you a deed?

A. Yes, sir.

Q. Now there was no escrow agreement?

A. No, sir.

Q. Was the deed and the mortgage both left at Mr. McCutcheon's office?

A. Yes, sir.

Q. Was the deed drawn in McCutcheon's office?

A. Yes, sir.

* * * * *

Q. You are the notary on the deed?

A. Yes, sir.

Q. And then the deed and the mortgage both were left in McCutcheon's office?

A. Yes, sir.

Q. Mr. Thomas was there at the time?

A. Yes, sir.

Q. It was the same day?

A. The mortgage was prepared the same day.

Q. As the deed and the note also?

A. Yes, sir.

Q. The note is dated December 4th?

A. Yes, sir.

Q. Which is several days after the date of the deed?

A. Yes, sir.

Q. All right, where was that prepared?

A. The note and the mortgage were prepared all in the same office.

Q. All right, now, the mortgage was dated the same day as the deed, you say, and it purports on the copy you have to be dated in November blank. When was it executed?

A. Well, the mortgage was executed after the deed was signed.

Q. The same day?

A. No.

Q. Well, you just now said it was the same day?

A. No, you asked me if it was prepared the same day.

Q. When was it executed?

A. I wouldn't know. It wasn't on the same day the deed was made.

Q. But was prepared on the same day?

A. Yes, sir.

Q. On November 30th?

A. Yes, sir.

Q. And when was it executed?

(No response.)

Q. What was the arrangement when you got this deed?

A. Well, the mortgage wasn't signed on the same day that the deed was signed. It was not but what day it was signed I wouldn't say for sure. The note says December 4th so I assume the mortgage was signed the same day.

Q. Now, what was the arrangement when you got this deed as to the payment for the property as to whether it would be escrow or a mortgage? Was an arrangement made then that a mortgage would be made?

A. Well, after the deed was signed, yes, there was arrangements made about the mortgage and where it was to be paid.

Q. After the deed was signed?

A. Yes, sir.

Q. You didn't have any agreement before that?

A. No, sir.

Q. So Mr. Thomas just left you a deed—an absent (probably should be absolute) deed—without getting a mortgage or note or security whatever?

A. He left the deed with Mr. McCutcheon. He left it in Mr. McCutcheon's care until the mortgage was prepared. He was supposed to come back in and sign it but he didn't that day, so that is what accounts——

Q. He didn't sign the deed that day?

A. He signed the deed that day but not the mortgage.

Q. He came back subsequently and in the meantime the mortgage was signed by Sylvia Henderson?

A. Yes, sir.

Q. Well, did he come back and get it?

A. Well, he must have, I don't recall just what——

Q. He never did get it, did he? You said they were both left in the office?

A. Well, they were left in the office." (TR 427.)

* * * * *

“Q. Mrs. Cutting, you said this deed was delivered to Sylvia in McCutcheon's office?

A. That deed was left in McCutcheon's office, yes.

Q. You said it was delivered to Sylvia in McCutcheon's office?

A. Well, from the first you have got this all twisted up, Mr. Grigsby. I said the deed was left in McCutcheon's office. The mortgage was left in McCutcheon's office; the note was left in McCutcheon's office and Mr. McCutcheon made arrangements

with Mr. Thomas to leave the deed and the mortgage and the note in the Union Bank for collection.

Q. Then there was no delivery of the deed to Sylvia of the deed, is that right?

A. Well, it was signed. I don't know just what you mean by the word 'delivery', Mr. Grigsby.

Q. Was it handed her or you for her?

A. Well, Mr. McCutcheon was my attorney and I took it for granted it was delivered to her for it was delivered to him for safekeeping.

Q. There was no escrow agreement whatever?

A. No.

Q. When were you to get this deed and have the privilege of recording it? The property was mortgaged back to him. Couldn't you have recorded it any time you wanted to?

A. Yes, that is usually the form, the deed is usually recorded and the mortgage is recorded.

Q. But it wasn't done?

A. Evidently not.

Q. And you didn't get that deed at all from the bank until you paid this note, did you—when you paid the balance of this note on July 1st, 1946, you got the deed out of the bank, didn't you?

A. Yes, sir.

Q. And then you didn't record it until August 4th?

A. No. You see I sent a check to the bank—I was busy at the time—for the full amount. I called them up and they told me what the full amount was.

Q. What was the full amount?

A. Four and some—seven hundred dollars.” (TR 424-429.)

* * * * *

From the foregoing it must be apparent that there was no delivery of the deed between vendor, Thomas, to Sylvia Henderson or to Audrey Cutting for Sylvia Henderson, or at all, until the purchase price had been paid in full, and that whether or not there was a mortgage, the deed, with or with an escrow agreement, was held in escrow by the bank until the balance of the purchase price was paid.

On February 10, 1949, Audrey Cutting testified as follows:

“Q. (by Mr. Kay). I believe there was some testimony as to who were the original parties to the contract. Who were these parties?

A. Between myself and Mr. Smith.

Q. Yourself and Mr. Thomas?

A. The original parties—I was not sure whether I had signed the contract or my daughter had signed the contract.

Q. Who were the parties to the purchase of the property?

A. Mr. Thomas and my daughter.

Q. You were not a party to that?

A. I wouldn't be sure.

Q. You are not certain as to whether you were a party to that contract?

A. No, I wouldn't be certain until I found the contract.

Q. You are certain that Sylvia Henderson is a party to that contract?

A. I wouldn't say that she was or wasn't.

Q. Is the deed to Sylvia Henderson?

A. Yes, sir.

Q. Was any deed ever prepared from Ralph Thomas to you?

A. Yes, sir.

Q. Certain?

A. Yes, sir.

Q. Positive?

A. Yes, sir." (TR 389-390.)

On Thursday, February 10, 1949, Audrey Cutting testified as follows:

"Q. (by Mr. McCarrey). I hand you a copy of the Anchorage News published last night and call your attention to the notice in which you state you are selling the whole of lot 2, block 37-D, in the South Addition in the near future. Did you cause that notice to be published?

Mr. Butcher. Objection.

The Court. Overruled.

Q. (by Mr. McCarrey). Is this the same property as is being litigated before the Court?

Mr. Butcher. Your Honor, the property is not being litigated.

Mr. McCarrey. I consider this very material, Your Honor, of material value as there are elements concerned. Furthermore the witness is guardian of Sylvia Henderson and I would like to inquire into the matter.

Mr. Butcher. I think this has nothing to do with the case.

Q. (by Mr. McCarrey). Is this notice the same lot on which the house that we have before the Court at issue is—that we have at issue before the Court?

A. Yes, it is.

Q. Are you the guardian of Sylvia Henderson?

A. Yes, sir.

Q. When were you so appointed guardian?

A. Just recently.

Q. January or February of this year?

A. I wouldn't be too positive as to the exact date.

Q. You would have to check?

A. Yes.

Q. Was it in December that you instituted proceedings to become guardian?

A. Yes, sir.

Q. Sometime subsequent then and in this year you were appointed guardian?

A. Yes, sir.

Q. For what purpose did you seek to be appointed guardian of Sylvia A. Henderson?

A. For the sale of lot in block 26-A of the South Addition, and the possibility of eventually or maybe selling the home on lot 2 in block 37-D of the South Addition.

Q. In what Court were you appointed guardian of Sylvia Henderson?

A. I was under the impression it was under the Court in Nome but I was mistaken so it was recently in the present Court I was appointed at Anchorage.

Q. Have you ever heretofore been appointed guardian?

A. I was given custody of her in Nome. I was under the impression at that time that that would also rule all guardianship matters.

Q. Then you never have been guardian before?

A. No, sir." (TR 396-397.)

On February 8, 1949 Audrey Cutting testified as follows:

Q. (by the Court). Did you ever tender any money to Mr. Smith in payment for his services under this contract?

A. No.

Q. Never gave him any money at all?

A. No.

Q. Did you ever offer to give him any money?

A. No.

Q. (by Mr. Grigsby). You have possession of those premises now?

A. That is right.

* * * * *

Q. You are getting the rent?

A. That is correct.

Q. (by the Court). When was the house first rented?

A. I believe that I actually didn't take possession until about the 15th day of July, 1948.

Q. Has it been rented since that time?

A. Mr. Fox moved recently but Mr. Lewis now lives in it.

Q. Would you mind telling us how much rent you are receiving?

A. I am receiving \$150 a month rent.

Q. Is this the same amount since first rented in July?

A. Yes." (TR 260-261.)

Now, resuming discussion of the Fourteenth Point, the Court did not find that there was no delivery of a deed of the real property from Ralph Thomas to Sylvia A. Henderson. On the contrary, the Court expressly found that after the completion of the construction of the building on the premises the deed was delivered to Sylvia A. Henderson and was thereafter, on the 4th day of August, 1948, recorded. (Finding of Fact XXIX, TR 86.)

This finding is in accord with all the evidence in the case.

Throughout the brief of appellants their counsel persists in the contention that there was an actual delivery of the deed to Sylvia A. Henderson on the date of its execution and this contention is wholly based upon the testimony of Audrey Cutting and on one answer made by her in response to a leading question in which the answer was virtually demanded, as appears in the extract from the testimony of Audrey Cutting heretofore quoted and which was as follows:

"Q. (by Mr. Butcher). And prior to the signing of this mortgage do you recall whether the deed was delivered to Sylvia Henderson or not?

A. Yes, but all the papers were left in escrow in the bank.

Q. Well, you answer my question. In the McCutcheon office was there a delivery made of the deed?

A. There was." (TR 420-421.)

On cross-examination, however, the witness, Cutting, testified as follows:

"Q. (by Mr. Grigsby). Mrs. Cutting, you said this deed was delivered to Sylvia in McCutcheon's office?

A. That deed was left in McCutcheon's office, yes.

Q. You said it was delivered to Sylvia in McCutcheon's office?

A. Well, from the first you have got this all twisted up, Mr. Grigsby. I said the deed was left in McCutcheon's office. The mortgage was left in McCutcheon's office; the note was left in McCutcheon's office and Mr. McCutcheon made arrangements with Mr. Thomas to leave the deed and the mortgage and the note in the Union Bank for collection.

Q. Then there was no delivery of the deed to Sylvia of the deed, is that right?

A. Well, it was signed. I don't know just what you mean by the word 'delivery', Mr. Grigsby.

Q. Was it handed her or you for her?

A. Well, Mr. McCutcheon was my attorney and I took it for granted it was delivered to her for it was delivered to him for safekeeping.

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Q. And you didn't get that deed at all from the bank until you paid this note, did you—when you paid the balance of this note on July 1st, 1946, you got the deed out of the bank, didn't you?

A. Yes, sir." (TR 428-429.)

The witness, Cutting, had previously several times testified that she paid the note about the 1st of July and thereupon received the deed from the bank.

The record shows that Ralph R. Thomas was served with summons in the original actions on August 4, 1948. This was the date the deed was recorded. It is probable that upon being served with process in these suits he immediately contacted Audrey Cutting, received payment of the balance due on the note given for the purchase price of the property and that she thereupon recorded the deed. That conclusion seems to have been arrived at by the Court judging from its statement made in the oral opinion as follows:

"In my opinion the deed was not delivered at the time it was executed and it was only delivered when it was released from the bank shortly before the 4th of August, if not on the 4th of August." (Sup. TR 583.)

As stated before in this brief, from all the testimony on this subject it is clearly apparent that there was no delivery of the deed between the vendor, Thomas, to Sylvia Henderson, or to Audrey Cutting for Sylvia Henderson, until the purchase price of the property had been paid in full and that whether or

not there was a mortgage, the deed, with or without an escrow agreement, was held by the bank until the balance of the purchase price was paid.

“A deed placed in escrow conveys no title.”

In re Chrisman, 35 Fed. Sup. 293 (4).

“While a deed is in escrow there is no delivery and the legal title remained in the grantor.”

Surratt et al. v. Fire Ass'n of Philadelphia, et al., 43 Fed. (2d) 271;

21 C. J. 882;

Calhoun County v. American Immigrant Co.,
93 U.S. 124.

Space will not permit this brief to include certain other testimony of Audrey Cutting which utterly destroyed her credibility. Reference is made to her testimony concerning the preparation and posting of notices of non-responsibility for liens which she claimed she posted on the premises involved on May 1, 1948, on behalf of herself and her minor daughter, on advice of her attorney. (TR 350-353.)

She testified that she prepared these notices from a form which she found in a gutter sometime previous to May 1st. (TR 384-391.)

Later she retracted this statement about finding the form in the gutter and stated that she got the form from a real estate book (TR 433-435), that it was on account of fear of prosecution for practicing law that she stated that she found the form in the gutter (TR 436-437), and that it was on advice of

her counsel that she retracted this statement and told the truth about the matter. (TR 440-441.)

With reference to the posting of the notices, Audrey Cutting testified that she posted three of these notices on May 1, 1948, the first on a carpenter's tool box and two on certain lumber then on said property; that a last notice was saved and when the basement was completed it was posted on the middle support beam of the basement. (TR 351-352.)

It was proven beyond doubt that there was no lumber on the premises on the date Audrey Cutting claimed to have posted the notices and that there was no tool box on the premises for more than a week after she so claimed. Many witnesses were called on this subject and a reading of the entire testimony of Audrey Cutting and a careful scrutiny of all the testimony of Audrey Cutting contained in the Transcript of Record will be necessary to enable this Appellate Court to appreciate the reasons that led the trial Court to make the statement on pages 585, 586 of the Supplemental Transcript which concludes as follows:

“The sum and substance of the testimony is that no notice was posted except possibly one in the basement. I arrive at the conclusion that one may have been posted in the basement only because another witness found a copy of the notice, which was introduced in evidence, in the basement after he moved in as a tenant of the building.”

Appellees contend that regardless of any presumptions which may arise from the execution of a deed as to its delivery and even, for the purposes of argument, admitting that "the presumption of delivery by virtue of the deed placed the burden of proving nondelivery on the plaintiffs" as stated on page 56 of appellants' brief, they have met the burden of proving nondelivery of the deed until after the completion of the construction of the building on the premises and have justified the finding of the Court on that subject of which counsel complains.

As to the Fifteenth Point raised, that the trial Court erred in finding against the evidence that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas of said real property, there was no such finding made by the Court.

The Court in its oral opinion, rendered March 4, 1949, expresses an opinion on this subject and stated with reference to the mortgage:

"While no particular point was made of it there is at least grave doubt as to whether Sylvia Henderson ever executed any mortgage in favor of Ralph R. Thomas. The original mortgage was not produced in court. It was never recorded. All that was produced in court is what a witness claimed to be a copy of it." (Sup. TR 583-584.)

The witness who produced the copy referred to by the Court was Audrey Cutting. The above expression of the Court indicates the conclusion arrived at by the Court as to the credibility of that witness.

As to the execution of a mortgage, there is no proof whatever of such execution except the testimony of Audrey Cutting. There was no finding of the Court on that subject. No error can be assigned on the Court's expression of opinion heretofore quoted with reference thereto and therefore, no further discussion of the subject is necessary.

It may be remarked, however, that if there was a mortgage it is strange that the same disappeared.

It will be noted that Audrey Cutting signed the note to secure the mortgage which is claimed by her to have been given. It is not contended by appellants that she signed the mortgage and it appears that the purported copy of the mortgage was dated several days prior to the date of the note, and it may be that in the course of the negotiations it was concluded by the attorneys in charge thereof that a mortgage signed by a minor would be no security for the payment of her note, not even as much as the co-signing of the note by Audrey Cutting, which was done. At any rate, the note and deed were placed in escrow at the bank and, as stated by Audrey Cutting herself, delivered to her when the note was paid.

ELEVENTH POINT RAISED. That the trial Court erred in rendering judgment against the real property of Sylvia A. Henderson when the said Sylvia A. Henderson had not been served personally or constructively with summons in accordance with the laws of Alaska.

Counsel prefaces his argument on the Eleventh Point raised by stating that Sylvia A. Henderson was not made a party to the original Complaints Nos. A-5087 and A-5088.

This is true. These actions were commenced on July 24, 1948 before the deed to Sylvia A. Henderson was recorded which was August 4, 1948, and there was no reason on the part of the lien claimants to make Sylvia A. Henderson a party. They were not concerned with secret equities.

In accordance with the authorities cited in connection with the Eighth Point raised and heretofore argued, Sylvia A. Henderson had no interest in the premises involved by virtue of an unrecorded deed as against the lien claimants, to the amount of their liens, at the time they were acquired.

Under the provisions of the Third Subdivision of ACLA, 1949, Sec. 26-1-13, heretofore quoted in full, in all actions to enforce any lien created by this chapter all persons personally liable and all lien holders whose claims have been filed and recorded shall be made parties, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may be made parties but such as are not parties shall not be bound by such proceedings.

Under this section Sylvia A. Henderson was not a necessary party.

That as has been shown in the discussion of the Eighth Point, Sylvia A. Henderson had no prop-

erty rights in the premises on which the liens were foreclosed as against the lien claimants to the amount of their liens, at the time they were acquired.

As to her having been served personally or constructively with summons and as to her being a party to the action, the brief of counsel does not state the true situation on pages 35 and 36 of his brief.

On page 36 thereof it is stated with reference to the intervention of the Anchorage Sand and Gravel Company:

“That the Order Granting Leave to Intervene gave authority to list, among other parties defendant, ‘and Sylvia A. Henderson, a minor, who have interest in the subject matter to be determined by the Court in the case of Ray Bullerdick, et al.’.” (TR 149, lines 10, 11, 12.)

This is an incorrect statement. The order referred to is that certain named persons, partnerships, and corporations; and Sylvia A. Henderson, a minor, who have an interest, in the subject matter to be determined by the Court in the cases of Ray Bullerdick, et al.,

“May intervene and file their Complaint in Intervention within three days from the signing of this Order, namely three days from the 9th day of November, 1948 upon the intervenors first serving a copy of their Complaint in Intervention and/or a copy of the Summons and Complaint upon the other interested parties aforesaid in said causes of action and filing the same on or before the 12th day of November, 1948.” (TR 561.)

There was no order ever made by the Court, at least until the 16th day of February, 1949, making Sylvia A. Henderson a party defendant or directing or permitting any intervenor to make her a party defendant. The most that the Court directed with reference to Sylvia A. Henderson was that she might intervene.

She did not intervene and did not appear in any case except in pleadings filed by Audrey Cutting assuming to answer on her behalf and by the assumption of authority by the counsel for appellants to appear for Sylvia A. Henderson in that behalf even to the extent of verifying the amended answer to complaint in intervention filed the 8th day of February, 1949 and verified January 30, 1949, the first paragraph of which amended answer is as follows:

“Comes now the defendant, Audrey Cutting and answering for herself and on behalf of her minor daughter, Sylvia A. Henderson, admits, denies and alleges as follows:”

and in which the affirmative defense contains the following:

“That the defendant, Audrey Cutting *for herself* and on behalf of Sylvia A. Henderson, a minor, entered into a contract with a licensed contractor, one Russell W. Smith, etc.” (Italics ours.)

And in the second amended answer filed February 14, 1949, the first paragraph is:

“Come now the defendants, Audrey Cutting and Sylvia A. Henderson, and for their Second Amended Answer admit, deny and allege as follows.”

And in which the affirmative defense recites:

“That the defendant, Audrey Cutting, is neither guardian nor agent for the defendant, Sylvia A. Henderson and that the defendant, Sylvia A. Henderson, is the sole owner of Lot 2 in Block 37-D as aforementioned.”

in which the counsel for appellants again assumes to act as attorney for the defendants.

And even after the case was tried and after counsel for the appellants had disavowed any authority to appear for Sylvia A. Henderson, he, on the 18th day of February, 1949, caused a third amended answer to be filed on behalf of the defendants, Audrey Cutting and Sylvia A. Henderson, reiterating the allegations set forth in the second amended answer.

With reference to the original cases, Nos. A-5087 and A-5088, the complaints, as stated before, were filed on July 24, 1948 before the deed to Sylvia A. Henderson was recorded and before the plaintiffs had any reason to believe that she claimed an interest in the property. As to these plaintiffs, at least, Sylvia A. Henderson became a purchaser after the suit was filed, is bound by the judgment and was not a necessary party.

“In the construction of registry acts the term ‘purchaser’ is usually taken in its technical legal

sense. It means a complete purchaser, or, in other words, one clothed with the legal title.”

Steele v. Spencer, 1 Pet. 552, 559, 7 L. Ed. 259.

“A purchaser of property affected by a lien who became such after the building or improvement was commenced is a proper party to the action but one who became such after suit brought is bound by the judgment and need not be made a party.”

36 *Am. Jur.* 157, Section 248, Mechanic’s Liens;

Whitney v. Higgins, 70 *Am. Dec.* 748;

Russell v. Grant, 26 S.W. 958.

In other words, one who buys into a law suit while the same is pending is bound by the judgment, and the law cannot make any exception of a minor.

The lien claims of the plaintiffs in the original suit, A-5087 were filed on the 30th day of June, 1948 which was prior to the time Audrey Cutting claims to have paid for the property and received the deed.

In original case No. A-5088, the lien claims were filed on the 23rd of July, 1948 prior to the date the deed of Sylvia A. Henderson was filed for record.

Lien claim of the Ketchikan Spruce Mills was filed on the 20th day of July, 1948, also prior to the recording of the deed to Sylvia A. Henderson.

The lien claim of the Alaska Plumbing and Heating Company was filed on the 3rd day of August, 1948, also prior to the recording of said deed.

The lien claim of the Kennedy Hardware Company was filed for record on the 2nd day of August,

1948, also prior to the date of recording said deed.

“A purchaser or incumbrancer of property upon which a mechanic’s lien is filed is chargeable with notice thereof by virtue of the mechanic’s lien statute itself without the filing of a notice of lis pendens. The enforcement of mechanic’s liens should be favored by a liberal construction of the statute.”

Empire Land and Canal Co. v. Engley, 33 Pac.
153.

“There are a few situations, however, in which even a bona fide purchaser or incumbrancer may be bound by the judgment even though the requirement of notice has not been complied with. This rule has been applied in respect to actions for the foreclosure of tax and mechanic’s liens on the theory that notice of such proceedings must always be presumed.”

24 *Am. Jur.* 383, Sec. 26.

It would appear from the foregoing authorities and from the difference in the situation of the respective lien claimants as to the time of the filing of their liens and commencing their suits, that whether or not Sylvia A. Henderson is bound by the judgment without having been served with summons, or made a party to the actions, depends upon the time of filing the liens and commencing the suits of the different claimants. At least with respect to the original claimants, and probably with respect to the intervenors, Ketchikan Spruce Mills, Alaska Plumbing and Heating Company, and Kennedy Hardware, she appears to be bound by the judg-

ment, and whether she is bound by the judgment as to all parties plaintiff depends upon the Appellate Court's view of the merits of the Twelfth and Thirteenth Points raised which logically should be discussed together.

TWELFTH POINT RAISED. That the trial Court erred in denying the motion to dismiss against Sylvia A. Henderson at the close of the trial on the ground that she was not made a party to the action by personal or constructive service of summons, and as an infant was not before the Court through a general guardian or guardian *ad litem*.

THIRTEENTH POINT RAISED. That the trial Court erred in appointing Audrey Cutting guardian *ad litem* at the close of the trial by its order *nunc pro tunc*.

The error assigned by the Thirteenth Point raised relates to the timeliness of the appointment of Audrey Cutting as guardian *ad litem* for the minor, Sylvia A. Henderson.

The argument of counsel for appellants does not relate to the error complained of, but entirely to the question of the right of the Court to appoint a guardian *ad litem* at all, where the infant has not been served with process, regardless of at what stage of the proceedings, the appoint is made.

Appellees contend and the authorities support the contention, that the question of timeliness is unimportant.

“Where it appears on the trial that one of several defendants is a minor the court may at such time in an order appoint a guardian ad litem nunc pro tunc.”

Seiden v. Reimer, 180 N.Y.S. 345.

“The rule seems to be that a guardian ad litem may be appointed at anytime before verdict.”

Starr v. McNamara, 182 N.Y.S. 746.

“Where the fact that defendant was a minor, but that defendant was not defended by a regular guardian or guardian ad litem, was not raised until defendant’s motions for new trial and in arrest of judgment, and during hearing on those motions court appointed a guardian ad litem, and ordered that pleadings previously filed for defendant be adopted by the guardian ad litem, defendant was not entitled to a new trial because guardian ad litem was not sooner appointed.

“Delay in the appointment of a guardian ad litem for a minor neither deprives the court of jurisdiction nor constitutes reversible error, where there is no showing of prejudice resulting therefrom.”

Johnston v. Calvin, 5 N.W. (2d) 840.

As to the right of the Court to appoint a guardian *ad litem* where the infant has not been served with process, the attention of this Court is called to Rule 17 of the Federal Rules of Civil Procedure, subdivision (c), which is as follows:

“Whenever an infant or incompetent has a representative, such as a general guardian, commit-

tee, conservator, or other like judiciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the infant or incompetent person."

These rules were not in effect in Alaska at the time this case was tried although they were put in effect by an Act of Congress of July 18, 1949, U.S.C. Title 48, Section 103a. These rules of Civil Procedure for the most part reflect what was already the law, or are an expression of what was already the inherent power of the Court, and not a departure therefrom.

The position of counsel for appellants is expressed on page 49 of his brief as follows:

"Where an infant has not been served with process, a judgment or decree against him or affecting his interest is erroneous, and the appointment of a guardian ad litem, or an appearance or answer by said guardian, does not bring the infant before the court, so as to justify such judgment or decree."

In support of this proposition counsel cites *Bank of U. S. v. Ritchie*, 8 Pet. (U.S.) 128, 8 L. Ed. 890.

This case is carefully reviewed in *Sloane v. Martin*, 40 N.E. 217 as follows:

“The first case which he cites is *Bank v. Ritchie*, 8 Pet. 128. That was a bill of review and a direct attack upon a judgment decreeing the sale of property in which infants had an interest. It did not appear that process had been served upon them. It did appear that a stranger had been appointed guardian ad litem, on the motion of counsel for the plaintiffs, without bringing the minors into court or issuing a commission for the purpose of making the appointment. As to that, Chief Justice Marshall said ‘it is not error, but is calculated to awaken attention.’ After pointing out other defects in the procedure he upholds the reversal of the decree citing many departures from correct usage, but never once intimating that the judgment was absolutely void for want of actual service of process upon the infants. It is inconceivable that so great a jurist should have overlooked such a defect if he so regarded it at all.”

The court in *Sloane v. Martin* reviews many authorities on this question and distinguishes cases where a personal judgment is sought against the minor and cases in which the proceeding is in the nature of a proceeding in rem, wherein no personal judgment is sought, pointing out that in New York by force of an explicit statute in foreclosure actions service of the summons must precede the appointment of a guardian ad litem, but the court held, however, in *Sloane v. Martin* that:

“In an action in a Federal Court in the nature of a suit in rem seeking to subject certain property, in which an infant is interested, to the payment of partnership debts, the appointment of a guardian ad litem for such infant, upon application of the mother, was sufficient to give the court jurisdiction without actual service upon the infant.” (Syllabus.)

The above conclusion was arrived at largely by reason of the opinion of Chief Justice Marshall in the *Bank v. Ritchie* case which counsel for appellants cites to the contrary, and which seems to afford a basis for the Federal Rule of Civil Procedure above quoted.

In the case on appeal no personal judgment was rendered or sought against Sylvia A. Henderson, nor could have been, even had she been made a party to the original cases and all suits in intervention and served with process.

Appellees have conceded, in the argument on the Eleventh Point raised, that Sylvia A. Henderson was not made a party to this action, nor served with process, except in the replies filed by plaintiffs and intervenors in response to amended answers filed by the counsel for appellants in which he assumed to act as her attorney. If made a party at all it was by virtue of the action of the court on February 16, 1950, the last day of the trial. At that time counsel for appellants disclaimed authority to act as attorney for Sylvia Henderson (TR 559-562) and at the same time assumed the authority to move the dis-

missal of the actions as against Sylvia Henderson. His authority even to make the motion is not disclosed.

Counsel contended that any judgment rendered by the Court could have no possible effect upon Sylvia Henderson.

Thus, in one breath, counsel contends that Sylvia Henderson is not a party and that he is not her attorney and in the next breath moves to dismiss an action against a person whom he contends is not a party and whom he has no authority to represent. How error can be assigned on the refusal of the Court to dismiss as against a party who has not been made a party and on motion of counsel who disclaims any authority to represent the party, is beyond our comprehension. However, at this juncture the Court made the order appointing Audrey Cutting as guardian ad litem for Sylvia Henderson and amending the pleadings to conform with that order and bring Sylvia Henderson into Court. (TR 561.)

If this was a void order, as contended by counsel for appellants, it could have no possible effect, and the situation would be the same as if Sylvia Henderson had never been mentioned in any of plaintiffs' or intervenors' pleadings.

Appellants' Brief is not clear as to whether it is contended that the judgment in this case is void or voidable. Counsel does contend, however, that the infant, Sylvia Henderson, was not made a party and that she is not bound by the judgment (Appellants'

Brief 46) and that the order of the Court was ineffective and of no legal significance.

In other words, counsel contends that the judgment is a nullity as to Sylvia Henderson. Nevertheless, he has appealed from the judgment, although his authority to take an appeal on behalf of Sylvia Henderson has not been revealed. If he is correct in his contentions, then the appeal on behalf of Sylvia Henderson was not necessary, her rights have not been affected by the judgment, and can be asserted in any proper proceeding. There is no occasion for a reversal of the judgment as to Sylvia Henderson.

The extent to which she is bound by the judgment as stated in appellees' argument on the Eleventh Point will depend upon the different situations of the various plaintiffs and intervenors and can be determined when, if ever, the judgment is attacked.

CONCLUSION.

A review of the testimony of the defense in this case, which consists almost entirely of the testimony of Audrey Cutting, may occasion some question in the mind of the Appellate Court as to who is the real party in interest in this action.

Audrey Cutting, in her sworn answers to the original complaints, and by reference thereto in all her other pleadings, alleged ownership in herself of the premises in controversy. She did not abandon this

position in her pleadings until her amended answer of February 14, 1949 was filed. She testified that in contracting for the construction of the residence she represented herself and her minor daughter, that for the purposes of the construction she was at that time what is considered the owner of the property, and she held herself out to various materialmen as such owner. In an answer filed February 8, 1949 she alleges that she contracted for the erection of the residence on behalf of herself and minor daughter.

On February 10, 1949 she testified that as guardian for her minor daughter she was advertising for sale the premises involved in this action and that prior thereto she had been appointed guardian for that purpose, which was the fact. Later, in response to examination by her counsel, she retracted this statement and stated that the proceeding for the appointment of guardian had not been completed, which was not the fact.

Referring to the contract for the purchase of the premises between herself and Ralph R. Thomas, which she later stated did not exist, she testified that she was not sure whether she had signed the contract or her daughter had signed the contract, that she was not certain whether or not she was a party to the contract of purchase or whether or not Sylvia Henderson was a party to that contract; that the deed was made to Sylvia Henderson; that there was a deed prepared from Ralph Thomas to her, of which she was certain. (TR 389-390.)

Whether or not Sylvia Henderson became a bona fide grantee by virtue of the deed purporting to be executed November 30, 1946 and recorded August 4, 1948 or whether or not she was simply being used as a "dummy" by Audrey Cutting for business convenience or, perhaps for the purpose of bringing about the situation which resulted, is a matter not susceptible of proof but open to conjecture and suspicion.

Throughout the Brief of Appellants Audrey Cutting is pictured as a devoted parent, seeking to establish a fund for the support and education of her minor daughter by the purchase of real estate and the improvement thereof for the purpose of deriving a substantial income therefrom. The purpose was commendable and became an accomplished fact to the extent that at the time of the trial she had possession of the premises and had received an income from rental to the amount of \$150.00 per month for the period of eight months. Thus, she got back the greater portion of her initial investment of \$1800.00 (TR 260, 261) and presumably, in fact did, continue to receive that income for some time thereafter, the judgment of the Court having been rendered on April 8, 1949 and the sale having taken place sometime later.

Audrey Cutting made a contract to pay \$9800.00 for the construction of the residence; she admitted an obligation of \$200.00 additional or \$10,000.00 altogether, but never paid, offered to pay or tendered

any part of this obligation, on the flimsy excuse that the contractor demanded \$13,500.00. This the contractor denied although admitting a demand for \$10,500.00. (TR 260-261; 251, 347; 338, 344.)

There was no dispute except as to the extent of \$500.00, and on account of this difference the contractor, Smith, was forced into bankruptcy.

Having been solely responsible for setting in motion a train of events which has resulted in the above situation Audrey Cutting now seeks by decision of this Court, not only to escape all personal responsibility, but to obtain title to this income bearing property for her daughter, free and clear of all encumbrances, and incidently to subject the lien claimants, laborers and materialmen to the payment of the considerable costs of this appeal.

The counsel for appellants seeks a reversal of the judgment herein, as to both defendants, on two grounds.

First. That his client, Audrey Cutting, has disowned the premises in controversy, and

Second. That he has himself disowned his other client, Sylvia Henderson.

As to Audrey Cutting, she is a proper party by the strict terms of the statute (Sec. 26-1-13, ACLA 1949.)

A judgment can be rendered against her under the provisions of Sec. 56-1-34, ACLA 1949.

Also the personal judgment against Audrey Cutting should be sustained, if for no other reason, because she should be considered estopped to disclaim ownership in the premises by reason of her representations.

The plaintiffs and intervenors have established that they performed labor and furnished materials to the extent of the liens claimed, that they filed liens substantially conforming to law to secure their claims, within the statutory time, and brought their actions within the time allowed by law.

Sylvia Henderson was represented at the trial, whether by legal authority or not, and represented by counsel selected by her mother who fought diligently to protect her interests. In fact there was no possible conflict between the interests of Sylvia Henderson and her parent, Audrey Cutting, both being identical, and the interests of Sylvia Henderson being the storm center of the law suit.

Even conceding the contentions of counsel for appellants, with relation to the interests of Sylvia Henderson in the premises foreclosed, to be well founded, it would only follow that Sylvia Henderson has not been in Court, no personal judgment has been rendered against her and whatever interest she has by virtue of the deed recorded August 4, 1948, need not be determined on this appeal, but can be adjudicated in any proper proceeding.

The judgment of the District Court should be sustained.

Dated, Anchorage, Alaska,
December 29, 1950.

Respectfully submitted,

GEORGE B. GRIGSBY,

Attorney for Appellees.

EDWARD V. DAVIS,

WENDELL KAY,

J. L. MCCARREY,

Of Counsel.

No. 12,324

IN THE
United States Court of Appeals
For the Ninth Circuit

AUDREY CUTTING and SYLVIA A.
HENDERSON,

Appellants,

VS.

RAY BULLERDICK, et al.,

Appellees.

APPELLANTS' REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN

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APPELLANTS' REPLY BRIEF.

The appellees have filed herein a brief purporting to answer the points raised by the appellants. In this Reply Brief, appellants will only respond to those matters raised in the appellees' brief, which, in their opinion, warrant a reply.

I. APPELLANTS COMMENT ON APPELLEES' STATEMENT OF FACTS AND NECESSARY CORRECTIONS THERETO.

With reference to the second paragraph of appellees' Statement of Facts, it is necessary to point out that there was no substantial proof in the trial of the case or as reflected in the Transcript of Record,

of an escrow agreement between Sylvia Henderson and Ralph Thomas or that the deed, mortgage, note, etc., was placed in the Union Bank of Anchorage in escrow. On one occasion, the appellant Audrey Cutting testified (TR 255, commencing with line 13) that the property was purchased from Ralph Thomas for and on behalf of appellant's minor daughter, Sylvia A. Henderson, on a contract, and upon being questioned (TR 256) if she had the contract in her possession, she replied, "I do believe I have it but I don't know just where. It might be in my personal possessions." And that later, on cross-examination by Mr. Kay of Counsel for appellees, Mrs. Cutting testified (commencing with Line 18, TR 388) that she had made a search for the real estate contract in various places, including the Union Bank and the offices of her attorneys, McCutcheon and Nesbett, and even attempted to get in touch with the original vendor, Mr. Thomas, to ascertain whether he had a copy of the contract but was unsuccessful, and that again upon re-direct examination, commencing with Line 14, TR 390, further inquiry was made as to the search that was made for the so-called contract and that such interrogation ends on Line 13, TR 391. The record further shows that Mrs. Cutting continued the search and that eventually she found evidence of the true facts surrounding the purchase of the lot in question from Ralph Thomas to Sylvia A. Henderson and that commencing with Line 23, TR 409, she reveals that she found a copy of the mortgage signed by Sylvia Henderson, her minor daughter

to the said Ralph Thomas, and that thereupon she (Witness Cutting) realized for the first time since the inception of the real estate transaction that the conveyance from Thomas to Sylvia Henderson was handled by way of a purchase money mortgage and further testifies on direct examination commencing with TR 409 and ending with TR 424, as to the details surrounding the transaction and introduced into evidence the copy of the mortgage, together with the original note executed by Sylvia A. Henderson, and Audrey Cutting, the appellant, mother of Sylvia A. Henderson. And that further, commencing on TR 424, she was cross-examined by attorney for appellees, Mr. Grigsby, regarding the mortgage and the delivery of the deed to Sylvia Henderson prior to the mortgage and she (Witness Cutting) established the fact upon said cross-examination (Line 6, TR 429) that there was no escrow agreement. That henceforth, in the entire trial of the case, no further attempt was made on the part of the plaintiffs, (present appellees), to prove that there was, in fact, a contract, that said papers were placed in escrow at the Union Bank.

It is certain from a full reading of the Transcript of Record that the mother of Sylvia A. Henderson, the said Audrey Cutting, did not truly recollect the circumstances surrounding the original sale of the lot which had occurred some two years prior to this trial and that she had no conception whatever of the legal meaning of the word "escrow."

Appellants comment further with reference to appellees' Statement of Facts as to paragraph 6 wherein appellees state, as a matter of fact, that the only financial disagreement between the contractor Smith and Cutting was the sum of \$500. While it is true that upon filing suit, the bankrupt Russell Smith sued for the sum of \$10,500, it is not a fact that he only demanded \$10,500 from the appellant Cutting and thus, paragraph 7, wherein appellees state that Russell Smith, the contractor, did not demand the sum of \$13,500 as stated in appellants' brief but did demand the sum of \$10,500 is not a statement of fact but is conjecture on the part of appellees arrived at by slanting the testimony sharply in favor of the bankrupt contractor, Smith. It is a fact that the total bill for materials and labor as supported by the lien claims of the laborers, in this record set forth on behalf of the appellees, and the lien claims of materialmen, represent a grand total of \$11,533.76, and had Russell Smith applied to that figure, a reasonable contractor's fee for his time, effort and services, the total bill would have been at least \$13,500 and therefore, it would seem that common business practice and the claims of the laborers and materialmen support the testimony of Audrey Cutting that the contractor did, in fact, make a demand upon her for \$13,500. Appellant however does not rely entirely on ordinary business practice, plus the claim of the laborers and materialmen to support her statement that the contractor demanded \$13,500 but it will be noted that the testimony of the contractor Smith was

so vague and ambiguous in all matters pertaining to the performance of this work that he was unable to even indicate the time (even to the month) when the work was finished, and that particularly with reference to the sum demanded, was unable to testify with any degree of certainty as to said amount. We call attention to the testimony of Smith commencing with Line 26, TR 337 and ending at the bottom of TR 338, which testimony is the only evidence, other than the evidence produced by Mrs. Cutting, as to the amount demanded and in this testimony the witness Smith has no conception as to what his records show and does not know whether the totals of his costs of labor and materials came to \$10,500 or approximately \$13,000. The testimony, however, of Audrey Cutting is specific on the subject both on direct and cross-examination. We call attention to her testimony on direct examination, Lines 6, 7, 8 and 9, TR 257, and upon cross examination where the witness testified (TR 258) that the contractor Smith billed her in the sum of \$13,500 and stated further (TR 259) that Mr. Smith did not agree (after the house was ostensibly constructed) to accept \$9800 because he was obligated to pay out \$13,500 to various laborers and business people. Thus, it would seem that paragraph 7 of appellees' Statement of Facts is based entirely upon the ambiguous and uncertain testimony of the contractor, Russell Smith, a witness whose credibility was impeached on many occasions throughout the Transcript of Record by his fellow witnesses, stating that his credit was no good, (Testimony of

Arthur Waldron, TR 251, Line 19) (Testimony of Harry Goudchaux, TR 517, Lines 23-26) (Testimony of Lyle Anderson, TR 327, Lines 5-28) and that he could not be trusted to pay his bills and that these other witnesses for the appellees, of which Russell Smith was one, in an effort to substantiate their own claims against the appellant, Audrey Cutting, destroyed any possible credit which might be extended to the testimony of the said Smith.

The last paragraph of appellees' Statement of Facts is also an erroneous statement and is not supported by the evidence adduced at the trial and as reflected in the Transcript of Record. In this paragraph, appellees state that at all events, nothing was paid on the contract and no amount offered or tendered by Audrey Cutting. We refer again to the testimony of appellees' witness, Contractor Smith, wherein the said Smith testified as follows (TR 333):

“Q. Mr. Smith, in your complaint you have prayed for the sum of \$10,500 for work done and materials and supplies furnished and services rendered, have you made demand on Mrs. Cutting here for this amount of money? A. No.

Q. You have never asked her to pay?

A. I have asked her a few times.

Q. Have you ever received any money from the contract? A. No.”

and that the witness Cutting on the question of tendering the money set forth in the contract, testified as follows (commencing Line 1, TR 357):

“(Testimony of Audrey Cutting)

Q. Did you ever receive a demand for payment?

A. He demanded his payment.

Q. Do you remember the date?

A. Payment was demanded shortly. We have all been rather confused just on the dates. That is why I asked you this morning as to what dates the liens had been put in on the property by the employees because it was ten days before that that payment had been asked for.

Q. Did he demand the total amount of \$13,500?

A. Yes, and Mr. Smith indicated that he was giving me quite a bargain. He didn't include ten per cent contractor's fees and didn't include his own labor against the place.

Q. Did you offer at that time to give him the \$9800 plus the \$200 in full settlement in accordance with the terms of your contract?

A. I was willing to give him the \$10,000 and explained what was going on out there that he had considerable work to straighten out besides the basement and I wanted that done before I made any payment of any sort.

Q. Have you always been ready, willing and able to pay it now?

A. Yes, sir.

Q. Are you ready to pay at any time?

A. Yes, at any time.

Q. Has he been able to explain in any way the reason for having exceeded the amount set forth in the contract?

A. No, except that it cost him more than he thought it was going to cost.”

and that the witness Cutting further, on Mr. Grigsby's cross-examination, made a tender of the money due on the contract in open Court, providing that she was relieved of responsibility for the amount of the liens; and had appellees' counsel not attempted to hedge the tender with terms impossible for appellant to meet, the money would have been paid then and there. This testimony commences Line 26, TR 366 and continues to Line 25, TR 369, wherein appellant Cutting offers full settlement of Smith's claim by the following Monday morning, on condition that it would be accepted as full settlement of the contract price and would relieve her from the responsibility of paying the lien claims, which claims amounted in aggregate to nearly \$12,000, but that counsel for appellees demanded that \$10,000 be tendered into Court in settlement of the claim of Russell Smith only, and that under such terms and conditions, the appellant Cutting properly refused to bring the money into Court, but that then and there occurred a tender which cannot be denied by appellees and therefore, paragraph 8 of appellees' Statement of Facts is not supported by the evidence.

ARGUMENT.

FIRST POINT RAISED: 1. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF COUNSEL FOR DEFENDANTS TO DISMISS AT THE CLOSE OF PLAINTIFFS' CASE ON THE GROUNDS THAT THE COMPLAINTS OF THE ORIGINAL PLAINTIFFS AND PLAINTIFF INTERVENORS DID NOT STATE GOOD CAUSES OF ACTION AGAINST THE DEFENDANTS.

SECOND POINT RAISED: 2. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF DEFENDANTS' COUNSEL TO STRIKE THE LIEN CLAIMS FILED BY PLAINTIFFS AND TO DISMISS AT THE CLOSE OF PLAINTIFFS' CASE ON THE GROUNDS THAT THE LIEN CLAIMS DID NOT CONTAIN SUFFICIENT FACTS TO CONSTITUTE VALID LIENS AGAINST THE REAL PROPERTY OF SYLVIA A. HENDERSON.

(Note: Points One and Two will be considered together as one point.)

The appellants are in error in stating, in connection with this point, that the trial Court erred in denying the motion of counsel for defendants to dismiss at the close of plaintiffs' case on the grounds that the complaints of the original plaintiffs and plaintiff intervenors did not state good causes of action against the defendants, and appellants here concede that they did not move as above stated at the close of plaintiffs' case. This motion was not made until both plaintiffs and defendants had rested, but the appellants do assert here that the motion was made when both plaintiffs and defendants had rested and was made on the grounds that the complaints of the original plaintiffs and plaintiff intervenors did not state good causes of action against the defendants and that the lien claims filed by plaintiffs did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson. It will be

noted (TR 559) that counsel for appellants moved to dismiss because of failure—motion to dismiss on the grounds that the plaintiffs fail to state a good cause of action, and there appears in the record three asterisks, indicating that further statements and arguments in support of this motion were deleted from the printed record as it was not felt necessary to burden the record with further reference to the motion and the arguments in support thereof. However, counsel for one of appellees, Mr. Kay, inquired of the Court (Line 11, TR 559) as to whether the motion was denied as to all parties, to which the Court responded as follows:

“All of the lien claims, as I understand, and therefore being denied covers all of the lien claims and the various complaints and the complaints of intervention. This motion, however, the question of jurisdiction, was never waived and defendant has a right to raise it at any time if he can during the main argument.”

During this argument, and during the argument on the motion, appellants did challenge the adequacy of both the complaints and the lien claims and this fact, i.e. the motion to strike the lien claims, is supported by the oral opinion of the trial Court (Supp. TR, 582, Lines 7-11) wherein the Court said:

“Question was raised as to the validity of the liens. I find that each and all of the liens are valid because they sufficiently comply with the law in our statutes upon the subject governing the matters which must be stated in the lien claims.”

Thus, the Court indicated that the lien claims of appellees had been moved against and the Court left open to counsel for appellants the right to raise motions at any time during the arguments which have not been printed in this record and to move against anything which pertained to the question of jurisdiction. Appellants therefore stand on the points of law and argument cited in appellants' brief in support of these points, except as conceded by the above concession as to the time when the motion was made, and no further argument is now required in reply to these points.

SIXTH POINT RAISED: 6. THAT THE TRIAL COURT ERRED IN AMENDING SUA SPONTE AND BY JUDGMENT THE COMPLAINTS OF THE PLAINTIFFS SUFFICIENT TO MAKE GOOD CAUSE OF ACTION.

It is necessary that appellants correct any erroneous presumption which might arise as a result of the filing of an answer on the part of the appellant Cutting, in which she admitted that she was the owner of that certain real property described as Lot 2 of Block 37-D, as specified by appellees on page 25 of appellees' brief. The original answer of the appellant Cutting was filed by counsel and verified by counsel for Mrs. Cutting while Mrs. Cutting was in California (TR 487, Lines 20 to TR 488, Line 11) and until the deed was actually produced in Court at the time of the trial, counsel was under the impression that Mrs. Cutting was the owner of the property

and that upon production of the deed and further investigation into the matter, it was learned that Mrs. Cutting was not the owner of the property, had never been involved in the property as owner, other than that she arranged for the purchase of said property from Ralph R. Thomas for her minor daughter, Sylvia A. Henderson who was, at that time, of the age of 15 years, and, therefore, it was necessary to file amended answers denying that the witness Cutting was the owner of the property and allege that the sole owner of the property, by virtue of the deed dated the 30th day of November, 1946, was Sylvia A. Henderson. This amendment was necessary to conform with the proof and there was no attempt during the trial of the case on the part of the appellants or appellees to prove otherwise—all parties acknowledging from the commencement of the trial that Sylvia A. Henderson was the vendee named in the deed of November 30, 1946. Reference is made here to the stipulation entered into between counsel at the commencement of the case and before any testimony was taken (TR 243, Line 11) wherein Mr. Davis of attorneys for appellees stipulated that Ralph Russell Thomas is the same person as the Ralph R. Thomas, and on August 1, 1948, a deed was recorded from Ralph R. Thomas to Sylvia A. Henderson and that deed, having been executed on the 30th day of November, 1946, conveying to Sylvia A. Henderson the property here in question, and that since the 4th day of August, 1948, Sylvia A. Henderson has been the record owner of the property in

question, and that throughout the remainder of the trial, no effort was made on the part of appellees to prove otherwise.

FIFTH POINT RAISED: 5. THAT THE TRIAL COURT ERRED IN AMENDING THE PLAINTIFFS' PLEADING SUA SPONTE AND BY JUDGMENT TO INCLUDE DEFENDANT, SYLVIA A. HENDERSON AS A PARTY DEFENDANT.

Appellants, in response to appellees' brief on the Fifth Point Raised, re-assert all of the statements of fact and argument contained in appellants' original brief, together with the knowledge of the Court and the knowledge of the appellees as to the position of Sylvia A. Henderson in this case. The second paragraph on page 27 of appellees' brief reads as follows:

"For the first time, on February 14, 1949, the appellees were informed of the claim of Sylvia A. Henderson as to the premises."

It had been previously pointed out in appellants' brief that the Court called attention to the fact that in the preliminary proceedings on the first morning of the trial. The Court, prior to proceeding with the case, said:

"Looking over the pleadings, I notice that nowhere is Sylvia A. Henderson named as a party"
(TR 242)

to which Mr. Davis, attorney for appellees, replied:

"It is my recollection that in a pleading filed by Mr. McCarrey, that Sylvia A. Henderson appeared as a defendant and that her name ap-

pears in the case, about 5 lines up from the bottom of the page”

and that in all or most of the complaints of the plaintiffs in intervention, Sylvia A. Henderson has been alleged to have an interest in the real property but that no one, at that time, took the trouble to determine whether the said Sylvia A. Henderson had ever been served with process in the matter or whether the said Sylvia A. Henderson appeared by guardian, general guardian, or guardian ad litem and it was not until the close of the trial when appellants made their motion that the case be dismissed insofar as Sylvia A. Henderson was concerned that the Court raised the question as to whether or not a guardian ad litem had been appointed and expressed the opinion that it was under the impression that such a guardian had been appointed at the commencement of the proceedings. All of this is more fully set forth in the original brief for appellants and we only assert here, as we have previously asserted, that the Court had no authority to make Sylvia Henderson a party defendant and “bring her before the Court” as it attempted to do by its Order at the close of the trial (TR 561, Lines 15-21) and that such an action was void and could not bring the said Sylvia Henderson into Court without service of process upon her and the Court was aware that no such process had been accomplished.

FIFTEENTH POINT RAISED: 15. THAT THE TRIAL COURT ERRED IN FINDING AGAINST THE EVIDENCE, THAT SYLVIA A. HENDERSON DID NOT EXECUTE A MORTGAGE TO RALPH THOMAS ON SAID REAL PROPERTY.

The point which seems to escape counsel for appellees with reference to the mortgage and the mortgage note is that the execution of the mortgage is the best evidence that delivery of the deed was made to Sylvia A. Henderson in the McCutcheon law office. Alaska is a "title theory state" insofar as the law of mortgages is involved and in order to convey property to a mortgagee, the mortgagor must have title. Title cannot be vested without delivery, constructive or actual. The transfer of title of the lot to Ralph R. Thomas by Sylvia A. Henderson by way of mortgage and his acceptance thereof presupposes prior vesting of title in Sylvia Henderson and thus delivery of the deed. Counsel for appellees comments that it is a strange thing that the original copy of the mortgage disappeared. Appellants see nothing strange about this, inasmuch as legal papers are often mislaid or destroyed where their value or purpose no longer exists. The Court also seems to doubt the existence of an original mortgage and makes the comment set forth in appellees' brief, page 59, taken from the Sup. TR, pages 583 and 584, but the Court also says in its next expression:

"It seems to me that if the mortgage had actually been executed, it would have been produced because the defendant, Audrey Cutting produced in Court the note to secure payment of which the mortgage was given."

This note was an original, signed by Sylvia Henderson and Audrey Cutting, and referred to the mortgage. Counsel for appellees, assert as they must to support their theory, that there was no mortgage at any time and therefore infer that the copy of the mortgage produced in Court was perhaps fictitious. However, counsel for appellees concedes that the note was held at the bank with the deed (Appellees' brief, page 60, lines 21-23) and we submit that the original note being bona fide, then certainly the existence and execution of the mortgage could reasonably be presumed. Had the note been fictitious and had it been produced by defendant with Sylvia Henderson's signature thereon simply for the occasion, then obviously a fictitious original copy of the mortgage could have been likewise easily produced.

It is certainly no great strain of logic to conclude that if the defendant Sylvia Henderson, a 15 year old child, was permitted to sign a mortgage and a note in the office of an attorney at law, that the said child and her mother did not have the benefit of the best legal advice and therefore the further details of the transaction could have been grossly mishandled, including failure to record.

The appellees continually reiterate that they were not concerned with the interests of Sylvia Henderson in the property because the full requirements of the law had been met by naming Ralph R. Thomas in the pleadings as the record owner of the property at the time the construction was commenced. This

proposition is a fiction and cannot be supported by legal reason. On the 30th day of November, 1946, the said Ralph Russell Thomas, by Warranty Deed, conveyed his right, title, and interest in the property to Sylvia Henderson. Sometime on or before the 4th day of August, 1948, the said Thomas was paid the small balance remaining due on the note. Thomas had no interest whatever in the property and indicated no interest in the property or the construction thereon during the entire period from the 30th day of November, 1946 to the time he was served with process in August of 1948, and the said Thomas received, on or before the 4th day of August, 1948, payment in full. Therefore, at least from that date on he was totally removed from the transaction, and whatever the situation as to title before that date, from that date on, the property belonged solely to Sylvia Henderson. Thus the foreclosure procedure had no effect upon the said Thomas nor concerned him in any way and the liens and encumbrances could not diminish his estate as he had none. The only effect of the foreclosure procedure was to deprive the minor, Sylvia Henderson, of property which was hers by virtue of the deed and payment in full and she was so deprived without any effort on the part of appellees to give the Court jurisdiction over her by service of process. Thus, she was deprived of her property without due process of law and to assume, in order to support appellees' contention that it was Ralph R. Thomas or his property that was foreclosed upon and who was deprived of his property is to reduce this

matter to an absurdity. Appellees, whatever their information regarding the interests of Sylvia Henderson in the property prior to August 4, 1948, were well aware from that date on, and in any event, many months before trial that Sylvia Henderson was the sole owner of the property and they could have, long before trial, amended their complaints to make Sylvia Henderson a party and to secure service upon her and to petition the Court prior to trial to appoint a guardian ad litem. They failed in all of these easily accomplished elements of jurisdiction and now resort to a ridiculous fiction in order to deprive this minor of her property.

Counsel for appellees, in several instances in appellees' brief, infers that Sylvia Henderson's interest in the property could be adjudicated in a proper proceeding; that this appeal is not a proper proceeding and this contention, of course, is without foundation, because Sylvia Henderson was made a party to this action by order of the Court, whether legal or otherwise, and her property has been sold at a Marshal's sale and she has been deprived of the use and the income of the same and now has simply appealed to this Court from the judgment of the trial Court. Counsel's reference to the possibility of other and independent action on the part of Sylvia A. Henderson to protect her rights appears in the last paragraph of appellees' brief and also on page 73, first paragraph, wherein counsel says:

"In other words, counsel contends that the judgment is a nullity as to Sylvia Henderson.

Nevertheless, he has appealed from the judgment, although his authority to take an appeal on behalf of Sylvia Henderson has not been revealed. If he is correct in his contentions, then the appeal on behalf of Sylvia Henderson was not necessary, her rights have not been affected by the judgment, and can be asserted in any proper proceeding. There is no occasion for a reversal of the judgment as to Sylvia Henderson.”

Counsel for appellees also comments on several occasions on the right of the personal judgment against Audrey Cutting as she was the person who contracted for the services of Russell Smith, the contractor, and was the person, according to the testimony of witnesses appearing for the Anchorage Sand and Gravel Company and the Ketchikan Spruce Mills, who authorized delivery of the materials to the project. Appellants have never denied the responsibility of Audrey Cutting in a proper proceedings against her for certain liabilities arising by reason of the construction on the lot which was done at her instance and request. However, such personal liability cannot be determined without determining the question of the responsibility of the contractor who, as has been pointed out in the original brief, made a contract whereby he guaranteed to hold Audrey Cutting safe from all liens, etc., appellants’ brief, page 4, third paragraph, and disregarding this pledge and guarantee in his contract, became so insolvent financially and was so insolvent financially at the

commencement of this construction that it was necessary for him to make private arrangements with laborers to wait until the completion of the job before receiving their wages, and as an extra consideration for their so waiting, arranged to pay a bonus of 10 cents per hour on all time. This kind of contracting is inherently dangerous inasmuch as many a contingency could arise during or at the end of the construction whereby under the strict terms of the contract, payment would not be in order, i.e., failure to follow plans and specifications; failure to finish the building, etc., and thus no contractor could, under these circumstances, guarantee the property to be free from the filing of liens. It appears on an examination of the contract, and the conduct of the contractor, that the whole transaction was extremely shaky. The contingencies which could be expected to arise under such a contract and under such arrangements with laborers and materialmen, could arise in this case, i.e., the contractors exceeding his original bill as indicated by the claims of lien and his demand upon Mrs. Cutting for a sum of money greatly in excess of the contract price. Such a demand, as a matter of contract law, was not a demand for performance of the contract on the part of Audrey Cutting and she was not liable to pay promptly and immediately any such demand on the part of the contractor, and thus, by the very nature of the transaction and the conduct of the contractor, the filing of liens by the laborers and materialmen was inevitable. Therefore, in order to attempt to make

Audrey Cutting personally liable, proper proceedings would have to be brought against her with an interpretation of the contract and the events surrounding its performance or lack of performance on the part of the Court.

Counsel for appellees on page 12, last paragraph, states that the lien statute of Alaska is taken almost in toto from the Oregon statute. Thus, for a proper analysis of the lien law in Alaska, reference must be made to the Oregon law and authorities on the subject and an examination of such law reveals that a contract made by a person who does not own an interest in the land, cannot be the basis for the filing and foreclosure of mechanic's liens. We cite here an article entitled "Mechanic's Liens in Oregon" written by Morris J. Galen and appearing in the Oregon Law Review for June, 1950, at page 308 and we quote from said article as follows:

"Generally, if the person contracting for the improvement does not own an interest in the land, liens for labor performed or materials furnished for the improvement will not attach to the land. This is clearly the law in Oregon."

and this statement is supported by the following authorities: *McFeron v. Doyens*, 116 Pac. 1063; *Equitable Savings & Loan Ass'n v. Hewitt*, 106 Pac. 447; *Litherland v. Cohn Real Estate Co.*, 100 Pac. 1 102, Pac. 303; *Sellwood Lumber Co. v. Monnell*, 38 Pac. 66; and *Pacific Spruce Corp. v. Oregon Portland Cement Co., et al.*, 286 Pac. 520, 522, 289 Pac. 489.

We further quote from page 319 of the Galen article:

“Thus, in the case of extensive improvement of real property, such as the remodeling of a building, the claimant may be denied a lien for his labor, services, or material if the contracting party had no interest in the real property. The claimant may, of course, bring an action against the contracting party; or, if the facts show unjust enrichment, an action based on quasi contract may be brought against the owner of the real property benefited by the improvement.”

Quoting from page 316 of the same article:

“The contractor, as the agent of the owner. Sec. 67-101 provides that ‘every contractor * * * or other person having charge of the construction * * * of any * * * improvement * * * shall be held to be the agent of the owner for the purpose of this act.’ The Oregon court has held that the contractor, under sec. 67-101, is the special agent, and not the general agent of the owner. Therefore, persons who deal with the contractor generally will not be allowed liens unless the labor, services, or materials performed or furnished by them were authorized by the contract between the owner and the contractor. The Oregon court, in *Beach v. Stamper* (74 Pac. 208, 210) said: ‘All authority to bind the owner on account of the building or buildings to be constructed must emanate from the original contract, which becomes the fundamental law for the government of all subcontracts, as they must be let under it and by virtue of the contractor’s authority obtained through it.’ Since the con-

tractor is merely a special agent, lienors who have dealt with him will be allowed liens only for the reasonable value of the labor, services, or materials performed or furnished by them, and not for the amount which the contractor agreed to pay them. The owner is not personally liable for the debts of the contractor, and no deficiency judgment may be rendered against the owner although the value of the property is not sufficient to satisfy all the claims against it."

On page 4 of appellees' brief, appellees have set forth a partial quotation of Section 26-1-2, Compiled Laws of Alaska 1949. The quotation, however, ends with the words

"* * * the land belonging to the person who caused the building or other improvement to be constructed, altered or repaired * * *"

The next clause of this sentence left out of the quotation is, however, of great importance and it is thought that this Court ought to have the benefit of this clause which reads as follows:

"but, if such person (person who caused the building or other improvement to be constructed) owned less than fee simple estate in such land, then only his interest therein shall be subject to such lien." (parentheses ours.)

Audrey Cutting obviously had no authority to order the construction of this building, had no authority to contract for the same and no authority whatever by virtue of law to cause any materials to be delivered or work to be performed thereon and

did so only upon an assumption of authority, without securing legal means of doing so, and her interest was not only less than a fee simple estate in such land but she had no interest whatever.

It will be noted that appellees continually insist and assert that there was an escrow agreement and in support of this assertion, they rely entirely upon the testimony of Audrey Cutting. The facts, upon investigation by her, showed there was no escrow whatever but simply a purchase money mortgage from Sylvia Henderson to Ralph Thomas with no escrow involved. Escrow, under the law, is composed of certain essential ingredients which must exist or escrow cannot arise. An escrow is a grant to be delivered to the grantee upon performance of a condition. The grantor gives the deed to the escrow holder or custodian, together with escrow instructions laying down the condition or conditions. The grantee performs the conditions, and the escrow holder delivers the deed to him. The escrow holder in the sale of property is at first the agent of both parties; when the condition is performed, he becomes the agent of each, i.e., of the grantee to deliver the deed and of the grantor to pay over the purchase money. It is generally true that a valid and binding contract must be entered into between the grantor and grantee in order to make a proper escrow. The contract must usually be in writing but has been known to exist without writing (*Tuso v. Green*, 229 Pac. 327). After performance by the grantee, however, title

passes to him as of the date of the delivery in escrow, as between the parties, title reverts back to the time when the grantee delivered the deed to the escrow holder (*McDonald v. Huff*, 19 Pac. 499). There is, however, in the record, no evidence of escrow beyond the statement of Mrs. Cutting which she later corrected when she discovered the mortgage and the mortgage note. The appellees, who were the plaintiffs in the original Court, could have easily, providing there had been an escrow, proved the same and established the fact beyond a doubt. However, they chose not to do so and relied entirely upon the testimony of Audrey Cutting. Appellees, on page 59 of their brief, first paragraph, state as follows:

“Appellees contend that regardless of any presumptions which may arise from the execution of a deed as to its delivery and even, for the purposes of argument, admitting that ‘the presumption of delivery by virtue of the deed placed the burden of proving nondelivery on the plaintiffs’ as stated on page 56 of appellants’ brief, they have met the burden of proving nondelivery of the deed until after the completion of the construction of the building on the premises and have justified the finding of the Court on that subject of which counsel complains.”

We submit that the appellees have not met the burden of proving nondelivery of the deed and have not met the burden of proving escrow.

CONCLUSION.

A review of the original brief, appellees' brief and all of the testimony contained in the Transcript of Record, indicates overwhelmingly that Sylvia A. Henderson, a minor, was deprived of her property without due process of law and that the judgment against her and the sale of her property following the judgment should not be permitted to stand but should be reversed. Likewise, the personal judgment against Audrey Cutting being entered by the Court in its judgment without regard to the contract between Audrey Cutting and the contractor Russell Smith, should be set aside and not allowed to stand.

Dated, Anchorage, Alaska,
January 31, 1951.

HAROLD J. BUTCHER,
Attorney for Appellants.

No. 12337

United States
Court of Appeals
For the Ninth Circuit.

DEPARTMENT OF WATER AND POWER OF
THE CITY OF LOS ANGELES, et al.,
Appellants,

vs.

THE OKONITE-CALLENDER CABLE
COMPANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

JAN 10 1950

PAUL P. O'CHEN, 

CLERK

No. 12337

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DEPARTMENT OF WATER AND POWER OF
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In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 8493-Y

THE OKONITE-CALLENDER CABLE COM-
PANY, INCORPORATED,

Plaintiff,

vs.

DEPARTMENT OF WATER AND POWER OF
THE CITY OF LOS ANGELES; THE CITY
OF LOS ANGELES, a Municipal Corporation,
Defendants.

COMPLAINT FOR MONEY DUE
ON CONTRACT

Comes now the plaintiff in the above-entitled ac-
tion and for cause of action alleges:

I.

Plaintiff is a corporation incorporated under the
laws of the State of New Jersey, having its prin-
cipal office at Paterson, New Jersey.

II.

Defendant, The City of Los Angeles, is now, and
was at all times in this Complaint mentioned, a
municipal corporation duly organized, incorporated
and existing under and by virtue of the laws of the
State of California, having its principal office at
Los Angeles, [2*] California, and said defendant is
a citizen of the State of California.

* Page numbering appearing at foot of page of Certified Transcript
of Record.

III.

Defendant, Department of Water and Power of the City of Los Angeles, is a department of The City of Los Angeles and is a citizen of the State of California.

IV.

The amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

V.

On or about the 21st day of May, 1946, plaintiff and defendants entered into a written contract wherein and whereby plaintiff agreed to manufacture, sell and deliver and defendants agreed to purchase certain paper insulated, lead covered cable, more particularly described as follows:

Item VI—35,000 ft. No. 2/0, 5000 volt, 3 conductor, stranded.

Item VII—48,000 ft. No. 6 AWG, 5000 volt, 3 conductor, stranded.

Item X—2,000 ft. 1,500 MCM, 600 volt, single conductor, stranded.

Item XIV—76,000 ft. 1/0, 600 volt, single conductor, stranded.

Item XV—100,000 ft. No. 4 AWG, 600 volt, single conductor, stranded.

Item XVI—80,000 ft. No. 6 AWG, 600 volt, single conductor, stranded.

VI.

That in and by said contract it was agreed that

said cable should be furnished at the following base prices:

Item VI—\$912.00 per M Ft., Total.....	\$31,920.00
Item VII—\$489.00 per M Ft., Total.....	\$23,472.00
Item X—\$1142.00 per M ft., Total.....	\$ 2,284.00
Item XIV—\$185.00 per M Ft., Total....	\$14,060.00
Item XV—\$120.00 per M Ft., Total.....	\$12,000.00
Item XVI—\$92.00 per M Ft., Total.....	\$ 7,360.00

VII.

That in and by said contract it was provided that the aforesaid prices for said cable should be subject to adjustment upwards or [3] downwards in the event of changes in labor costs and/or material costs, and for the purpose of such adjustment the proportion of the contract price representing labor was agreed upon by the plaintiff and said defendants as twenty (20%) per cent of said contract price, and for the purpose of adjustment of the contract price with respect to materials used in the manufacture of said cable, it was agreed between the plaintiff and the said defendants that material would represent fifty (50%) per cent of the contract price. During the term of said contract, labor costs increased and the plaintiff and the said defendants were able to agree upon the amount of the increase of the contract price with respect to said items under a formula contained in the said contract and said adjustment of the contract price because of the increase in labor costs is not here in controversy.

VIII.

Said contract provided that if the materials used in said cable increased in price as shown by the index of wholesale prices compiled monthly by the United States Department of Labor over the index price for the base month provided for in said contract, that said contract price would be increased based upon said United States Department of Labor index. Said price index in question would be applied as of the month specified in said contract for the delivery of the cable in that particular month. Said contract further provided for a decrease in the contract price if the cost of materials used in said cable decreased, based on said index of the United States Department of Labor. Plaintiff's claim herein is based on increases of the cost of materials used in said cable during the period of said contract. Said contract further provided that payment for increases or credit for decreases in the contract price resulting from the foregoing adjustments would be deferred until the time of final payment under the terms of said contract. Said contract further provided that the total contract price should not be increased under said adjustment clause by more than thirty (30) per cent of the original contract price. [4]

IX.

Plaintiff alleges that during the period of said contract and before the completion thereof, increases occurred in the cost of both labor and materials. That the two principal materials used in

the manufacture of said cable were copper and lead and that the average increase in the monthly index figures referred to in said contract and compiled by the United States Department of Labor for copper and lead for the period from April, 1946, the base month, to October, 1946, was 28.6; for the period from April, 1946, to January, 1947, was 53.9, and for the period from April, 1946, to March 1947, was 70.2; and the percentage increase for the period from April, 1946, to October, 1946, was 17.6%; for the period from April, 1946, to January, 1947, was 33.2%; for the period from April, 1946 to March, 1947, was 43.2%.

X.

That plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price because of the materials used in said cable.

XI.

That prior to the commencement of this action, plaintiff duly and regularly filed and presented to the defendants a duly verified claim as required by law, claiming that said defendants, and each of them, were and are indebted to the plaintiff in the amount herein sued for, in addition to the further amount of Three Thousand Six Hundred Seventy-one and 56/100 Dollars (\$3,671.56) referred to in Paragraph XII.

XII.

That thereafter and on or about January 14, 1948, the defendants notified plaintiff that plaintiff's

claim was allowed in the sum of Three Thousand Six Hundred Seventy-one and 56/100 Dollars (\$3,671.56), but the balance of the claim was rejected without prejudice either to the plaintiff or to said defendants. That [5] plaintiff has complied with all of the conditions necessary to entitle plaintiff to bring this action against the said defendants, The City of Los Angeles and the Department of Water and Power of The City of Los Angeles, and plaintiff has duly performed all the terms and conditions of said contract on its part to be performed.

XIII.

That said allowance by the said defendants of Three Thousand Six Hundred Seventy-one and 56/100 Dollars (\$3,671.56) constitutes a part only of the increased contract price occasioned by the increase in the cost of copper and lead used in the manufacture of said cable as evidenced by the United States Department of Labor index.

XIV.

That pursuant to the price adjustment clause in said contract, plaintiff became entitled to an increase in the base contract price on account of materials used in said cable in the amount of Thirteen Thousand Six Hundred Sixty-eight and 46/100 Dollars (\$13,668.46). That the said defendants are entitled to a credit with respect to said amount in the sum of Three Thousand Six Hundred Seventy-one and 56/100 Dollars (\$3,671.56) representing a portion of plaintiff's claim allowed by said defendants

and paid by said defendants prior to the filing of this action, leaving a balance now due, owing and unpaid from said defendants to plaintiff in the sum of Nine Thousand Nine Hundred Ninety-six and 90/100 (\$9,996.90). That said sum, together with the allowance of Three Thousand Six Hundred Seventy-one and 56/100 Dollars (\$3,671.56), does not exceed the thirty (30%) per cent limitation hereinbefore referred to in Paragraph VIII of this Complaint.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of Nine Thousand Nine Hundred Ninety-six [6] and 90/100 Dollars (\$9,996.90), together with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of March, 1947, until paid, for plaintiff's costs herein incurred and for such other and further relief as may be just in the premises.

/s/ STEPHEN A. WILSON,
By FREDERIC H. STURDY.

/s/ HENRY F. PRINCE,
By FREDERIC H. STURDY.

/s/ FREDERIC H. STURDY.

GIBSON, DUNN & CRUTCHER

By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 2, 1948. [7]

[Title of District Court and Cause.]

ANSWER

Come Now the defendants The City of Los Angeles, a municipal corporation, and the Department of Water and Power of the City of Los Angeles, and answering plaintiff's complaint herein, admit, allege and deny as follows:

I.

These answering defendants admit the allegations of Paragraphs I, II, III and IV of plaintiff's complaint. [8]

II.

Answering the allegations of Paragraphs V and VI of plaintiff's complaint, these answering defendants admit and allege that on May 21, 1946, the defendant Department of Water and Power of the City of Los Angeles and the plaintiff herein executed a written contract, pursuant to advertisement inviting bids and award, for the furnishing and delivering to the Department of paper insulated, lead covered cable, f.o.b. cars, Paterson, New Jersey, in the quantities, kind and at the prices as follows:

Item VI—35,000 feet No. 2/0, 5000 volt, 3 conductor, stranded, for a price of \$912.00 per thousand feet, making a total price of.....	\$31,920.00
Item VII—48,000 feet No. 6 AWG, 5000 volt, 3 conductor, stranded, for a price of \$489.00 per thousand feet, making a total price of.....	23,472.00

- Item X—2,000 feet 1,500 MCM, 600 volt,
single conductor, stranded, for a price
of \$1142.00 per thousand feet, making
a total price of.....\$ 2,284.00
- Item XIV—76,000 1/0, 600 volt, single
conductor, stranded, for a price of
\$185.00 per thousand feet, making a
total price of..... 14,060.00
- Item XV—100,000 feet No. 4 AWG, 600
volt, single conductor, stranded, for a
price of \$120.00 per thousand feet,
making a total price of..... 12,000.00
- Item XVI—80,000 feet No. 6 AWG, 600
volt, single conductor, stranded, for a
price of \$92.00 per thousand feet,
making a total price of..... 7,360.00

Further answering the allegations of said Paragraphs V and VI, these answering defendants admit and allege that said contract also provided that said lead covered cable would be delivered to the Department, f.o.b. cars, Paterson, New Jersey, in sufficient time so that receipt thereof at Los Angeles, California, as to each item or portion thereof, would begin and be completed as follows:

	Item No.	Beginning Date	Completion Date
VI	15 reels	July 1, 1946	October 31, 1946
	10 reels	November 1, 1946	January 31, 1947
	10 reels	February 1, 1947	March 31, 1947
VII	}		
X		July 1, 1946	October 31, 1946
XIV		November 1, 1946	January 31, 1947
XV		February 1, 1947	March 31, 1947
XVI			

Further answering the allegations of Paragraphs V and VI of plaintiff's complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraphs V and VI not herein expressly admitted in this Paragraph II of defendant's answer.

III.

Answering the allegations of Paragraphs VII and VIII of plaintiff's complaint, these answering defendants admit and allege that said contract also provided as follows:

"1.3. Price Adjustment Clause: The contract price shall be subject to adjustment for changes in labor and/or material costs, such adjustments to be determined in accordance with the following method, provided, however, that the price shall not be increased by virtue of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942.

"1. Labor:

"a. For the purpose of adjustment, the proportion of the contract price representing labor is accepted as 20%.

"b. The above amount accepted as representing labor will be adjusted for increases in labor costs, such adjustment to be based on the index of hourly earnings of the 'Electrical Equipment' manufacturing industry, compiled monthly by the U. S. Department of Labor, Bureau of Labor Statistics. The average of the monthly labor index figures for

the period from the date of receipt of the Contractor's proposal, April, 1946, (hereinafter referred to as the Base Month) to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly labor index figure with the labor index figure for the Base Month. The adjustment [11] for increases in labor will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing labor, as indicated above, and the result will be accepted as an increase in the contract price.

"c. If the average monthly labor index figure computed as provided in paragraph b above is less than the labor index figure for October, 1941, the percentage decrease of such average monthly labor index figure from such October, 1941, figure will be computed. The adjustment for decrease in labor will be obtained by applying such percentage of decrease to the amount of the contract price representing labor, as indicated above, and the result will be accepted as a decrease in the contract price.

"2. Material:

"a. For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

"b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI—Metals

and Metal Products' compiled monthly by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly material index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, [12] if any, to the amount of the contract price representing material, as indicated above, and the result will be accepted as an increase in the contract price.

“c. If the average monthly material index figure computed as provided in paragraph b, is less than the material index figure for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941, figure will be computed. The adjustment for decrease in material will be obtained by applying such percentage of decrease to the amount of the contract price representing material, as indicated above, and the result will be accepted as a decrease in the contract price.

“3. General:

“a. The adjustment to which the contract price is subject will be determined as provided for above, except—

“1. If shipment under this contract is extended more than three months from the contract date as

a result of causes beyond the reasonable control of the contractor, or because of fire, strike, civil or military authority, etc., the adjustment in contract price for changes in labor and material costs may at the option of the contractor be based on the period from date of receipt of contractor's quotation to the date when complete shipment is made.

“2. If the contract is modified, resulting in a change in contract price or contract date of shipment, the adjustment will be modified accordingly.

“b. In determining the adjustment in contract price, the percentage of increase or decrease in labor and material costs will be calculated to the nearest 1/10th of 1%. [13]

“c. If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the selection of substitute indices will be made by mutual agreement of the parties to this contract.

“d. Payment for increase or credit for decrease in the contract price, resulting from the above will be deferred until the time for final payment under the terms of the contract.

“Ceiling for Expenditures: The total price shall not be increased under the foregoing price adjustment clause by more than 30 per cent over the original bid price.”

Further answering the allegations of Paragraphs

VII and VIII, these answering defendants admit that during the term of said contract the labor cost increased and the plaintiff and defendants agreed upon the amount of the increase of the contract price with respect to said items under the above-quoted provisions of the contract, and that the adjustment of the contract price on account of increase in labor cost is not in controversy in this action.

Further answering the allegations of Paragraphs VII and VIII, these defendants deny generally and specifically each and every allegation therein contained and set forth not herein expressly admitted in this Paragraph III of defendant's answer. [14]

IV.

Answering the allegations of Paragraph IX of said complaint, these answering defendants admit and allege that from the month of April, 1946, to the month of March, 1947, both months inclusive, the index of wholesale prices for "Group VI—Metals and Metal Products"—compiled monthly by the United States Department of Labor showed an increase in material costs and the index of hourly earnings of the "Electrical Equipment" Manufacturing Industry compiled by the United States Department of Labor, Bureau of Labor Statistics, showed an increase in labor costs.

Further answering the allegations of said Paragraph IX, these answering defendants admit that lead and copper constitute a large proportion of the materials used in the manufacture of said cable.

Further answering the allegations of said Paragraph IX, these answering defendants admit and allege that the United States Department of Labor, Bureau of Labor Statistics, published in each month from April, 1946, to March, 1947, both months inclusive, its computation of index numbers of wholesale prices by groups and subgroups of commodities and by individual commodities, and that said groups were designated as follows:

Farm Products
Foods
Hides and Leather Products
Textile Products
Fuel and Lighting Materials
Metals and Metal Products
Building Materials
Chemical and Allied Products
Housefurnishing Goods
Miscellaneous. [15]

These defendants admit and allege that the sixth group of index numbers of wholesale prices so published—"Metals and Metal Products"—was divided into subgroups of commodities as follows:

Agricultural Implements
Iron and Steel
Motor Vehicles
Nonferrous Metals
Plumbing and Heating.

These defendants admit and allege that there are sixteen commodities listed under the subgroup

“Nonferrous Metals,” including “Copper, Electrolytic,” delivered Connecticut Valley, and “Lead, Pig, Desilverized,” f.o.b. New York.

These defendants admit and allege that said publication of index numbers of wholesale prices was based upon the prices for the year 1926 equalling 100, and that said publication set forth an index number of the wholesale price for each group of commodities above mentioned and set forth an index number of the wholesale price of each subgroup of commodities above mentioned and an index number of the wholesale price of each individual commodity listed under each group and subgroup of commodities above mentioned.

These defendants admit and allege that for said months beginning in April, 1946, and ending in March, 1947, both months inclusive, said United States Department of Labor, Bureau of Labor Statistics, published the index numbers of the wholesale price of “Copper, Electrolytic,” delivered Connecticut Valley, and “Lead, Pig, Desilverized,” f.o.b. New York, as hereinafter set forth under Columns 1, 2 and 3, respectively; that the sum of said two index numbers for each of said months, respectively, [16] is the amount hereinafter set forth under Column 4; that the average amount of the two index figures for the period from the base month of April, 1946, to and including each of the several months specified in the contract for final shipments and the increase of said average amount over said base month, and the respective percent-

ages of increase of each of said average figures over said base month are hereinafter set forth under Columns 5, 6 and 7, to wit:

1. (Month)	2. (Copper)	3. (Lead)	4. (Total)	5. (Average)	6. (Increase)	7. (Increase)
Apr. 1946	85.4	77.1	162.5			
May	85.4	77.1	162.5			
June	102.3	97.9	200.2			
July	102.3	109.7	212.0			
Aug.	102.3	97.9	200.2			
Sept.	102.3	97.9	200.2			
Oct.	102.3	97.9	200.2	191.1	28.6	17.6%
Nov.	122.6	125.6	248.2			
Dec.	138.8	145.3	284.1			
Jan. 1947	139.6	154.2	293.8	216.4	53.9	33.2%
Feb.	142.3	157.2	299.5			
Mar.	151.2	177.9	329.1	232.7	70.2	43.2%

Further answering the allegations of Paragraph IX of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraph IX not herein in this Paragraph IV of this answer expressly admitted. [17]

V.

Answering the allegations of Paragraph X of plaintiff's complaint these answering defendants admit and allege that plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price, in accordance with the terms of Paragraph F 1.3, Price Adjustment Clause, of the contract heretofore alleged and set forth in Paragraph III of this answer, by reason of the increases in material costs.

Further answering the allegations of Paragraph X of said complaint, these answering defendants

deny generally and specifically each and every allegation contained and set forth in said Paragraph X not herein in this Paragraph V of this answer expressly admitted.

VI.

Answering the allegations of Paragraph XI of plaintiff's complaint, these answering defendants admit and allege that on September 30, 1947, and prior to the commencement of this action, plaintiff filed and presented to the defendants a verified claim, claiming that said defendants were indebted to the plaintiff in the amount of \$15,869.40, less the sum of \$2,016.32 theretofore billed by the plaintiff and paid by the defendants, plus California Use Tax, on account of increases in labor and material costs, leaving a balance claimed by plaintiff in the sum of \$13,853.08, plus California Use Tax thereon in the sum of \$346.33, making a total claim of \$14,199.41.

Further answering the allegations of Paragraph XI of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraph XI not herein in this Paragraph VI of this answer expressly admitted.

VII.

Answering the allegations of Paragraph XII of plaintiff's complaint, these answering defendants admit that [18] thereafter and on or about January 14, 1948, the defendants notified plaintiff that plaintiff's claim was allowed in the sum of \$3,671.56, but the balance of said claim was re-

jected, without prejudice either to the plaintiff or to these defendants, and that plaintiff has duly performed all of the conditions of said contract on its part to be performed.

Further answering the allegations of Paragraph XII of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraph XII not herein in this Paragraph VII of this answer expressly admitted.

VIII.

Answering the allegations of Paragraph XIII of plaintiff's complaint, these answering defendants admit and allege that said allowance by these defendants of the sum of \$3,671.56 included \$89.55 on account of California Use Tax, and constitutes a part only of the increased contract price in the total amount of \$5,598.33, of which amount the sum of \$2,016.32 was paid prior to the filing of said claim, occasioned by increases in labor costs, in accordance with the terms of the contract, as well as by increases in material costs based on the index of wholesale prices for "Group VI—Metals and Metal Products"—compiled monthly by the United States Department of Labor, and computed in accordance with the terms of said contract hereinabove set forth in Paragraph III of this answer.

Further answering the allegations of Paragraph XIII of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Para-

graph XIII not herein in this Paragraph VIII of this answer expressly admitted. [19]

IX.

Answering the allegations of Paragraph XIV of plaintiff's complaint, these answering defendants admit and allege that pursuant to the Price Adjustment Clause in said contract hereinbefore alleged in Paragraph III of this answer, plaintiff became entitled to an increase in the contract price on account of labor costs computed in accordance with the terms of said contract and on account of increases in material costs, based on the index of wholesale prices for "Group VI—Metal and Metal Products" compiled monthly by the United States Department of Labor, in the amount of \$5,598.33, plus California Use Tax thereon, and no more.

These defendants admits and allege that prior to the filing of said claim and between the months of April, 1946, and January, 1947, both months inclusive, the plaintiff shipped to the defendants lead covered cable the contract price of which, as hereinbefore alleged, was \$61,053.35, plus California Use Tax in the amount of \$1,418.95; that plaintiff computed the amount of the increase thereon on account of increases in labor costs as being the sum of \$733.31, and computed the amount of increase thereon on account of increases in material costs to be the sum of \$1,283.01, making a total of \$2,016.32, plus California Use Tax in the amount of \$50.40, and that plaintiff billed these defendants

therefor and that these defendants paid said sum, plus California Use taxes thereon, to plaintiff on account of said increases in labor costs and in material costs.

These defendants admit and allege that subsequent to the filing of said claim, as alleged in plaintiff's complaint, these answering defendants paid to plaintiff the additional sum of \$3,671.56, of which the sum of \$659.54 was on account of increases in labor costs and the sum of \$2,922.47 was on account of increases in material costs, and the sum of \$89.55 was on account of California Use Tax thereon.

These defendants admit and allege that the total amount paid to plaintiff on account of increases in labor costs and material costs is the sum of \$5,598.33, plus California Use Tax thereon, and that said sum is comprised of \$1,392.85 on account of increases in labor costs and \$4,205.48 on account of increases in material costs; that said defendants are entitled to a credit with respect to said amount of \$5,598.33, plus all taxes, representing the amount paid prior to the filing of plaintiff's claim and the amount paid subsequent to the filing of said claim and prior to the filing of this action; that the total price is not increased by more than thirty per cent over the original contract price hereinbefore in this answer alleged.

Further answering the allegations of Paragraph XIV of plaintiff's complaint, these answering defendants allege that for the months beginning April, 1946, and ending in March, 1947, said United States Department of Labor, Bureau of Labor Statistics,

published the index of wholesale prices for “Group VI—Metal and Metal Products,” as hereinafter set forth under Columns 1 and 2, and that the average amount of said index figures for the period from the base month of April, 1946, to and including each of the several months specified in the contract for final shipments, and the increase of said average amount over said base month, and the respective percentages of increase of each of said average figures over said base month, are as hereinafter set forth under Columns 3, 4 and 5, to wit: [21]

1. Month)	2. (Group VI)	3. (Average)	4. (Increase)	5. (Increase)
Apr. 1946	108.8			
May	109.4			
June	112.2			
July	113.3			
Aug.	114.0			
Sept.	114.2			
Oct.	125.8	114.0	5.2	4.8%
Nov.	130.2			
Dec.	134.7			
Jan. 1947	138.0	120.1	11.3	10.4%
Feb.	137.9			
Mar.	139.9	123.2	14.4	13.2%

These defendants admit and allege that based upon the increase of said average amount over said base month and the respective percentages of increase hereinbefore in this paragraph alleged, according to the index of wholesale prices for “Group VI—Metal and Metal Products,” the total amount of the increases in material costs under said contract is the sum of \$4,205.48.

That said sum is computed in accordance with the provisions of said contract in the manner here-

inafter set forth, namely, that the contract item number, the month specified in the contract for final shipment, the amount of the particular item to be delivered, the original contract price, the per cent of contract price applicable to materials, the per cent of increase for each period and the amount of increase in dollars [22] and cents, are all as herein-after set forth under Columns 1 to 7, respectively, and the product of the figures in Columns 3, 4, 5 and 6 being set forth in Column 7, which is the amount of the increase expressed in dollars and cents, to wit:

1.	2.	3.	4.	5.	6.	7.
VI	Oct. 1946	$3/7 \times$	$\$31,920.00 \times$	$50\% \times$	$4.8\% =$	\$ 328.32
	Jan. 1947	$2/7 \times$	$31,920.00 \times$	$50\% \times$	$10.4\% =$	474.24
	Mar. 1947	$2/7 \times$	$31,920.00 \times$	$50\% \times$	$13.2\% =$	601.92
VII, X,	Oct. 1946	$1/3 \times$	$59,176.00 \times$	$50\% \times$	$4.8\% =$	473.41
XIV, XV,	Jan. 1947	$1/3 \times$	$59,176.00 \times$	$50\% \times$	$10.4\% =$	1,025.72
XVI	Mar. 1947	$1/3 \times$	$59,176.00 \times$	$50\% \times$	$13.2\% =$	1,301.87
Total Material Increase						<hr/> \$4,205.48

These defendants allege that the original contract price of \$91,096.00 for all of the material agreed to be furnished, and furnished, by plaintiff herein has been paid, and that all of the money due under the terms of said contract on account of increases in labor costs and on account of increases in material costs, as hereinbefore alleged, have been heretofore paid by these defendants to plaintiff herein, and that no additional money is now unpaid by these defendants to plaintiff herein under and by virtue of the terms and provisions of the above-mentioned contract. [23]

Wherefore, these answering defendants pray that plaintiff take nothing by reason of their complaint herein; for their costs of suit herein incurred; and for such other and further relief as may be just in the premises.

/s/ RAY L. CHESEBRO,

City Attorney,

/s/ GILMORE TILLMAN,

Chief Assistant City Attorney for Water and Power,

/s/ RUSSELL B. JARVIS,

Assistant City Attorney,

/s/ GERALD LUHMAN,

Deputy City Attorney,

Attorneys for Defendants.

State of California,

County of Los Angeles—ss.

William A. Holt, being first duly sworn, deposes and says:

That the Department of Water and Power of The City of Los Angeles, one of the defendants in the above-entitled action, is a department of the City government created by the Charter of The City of Los Angeles, a municipal corporation of the State of California, and is under the control and management of the Board of Water and Power Commissioners of The City of Los Angeles; that affiant is a member and an officer, to wit the President, of said Board; that affiant has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except

as to the matters which are therein stated upon his information or belief, and as to those matters that he believes to be true.

/s/ WILLIAM A. HOLT.

Subscribed and sworn to before me this 12th day of October, 1948.

/s/ C. L. CURLEY,

Notary Public in and for Said
County and State.

[Notarial Seal.]

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 14, 1948.

[Title of District Court and Cause.]

PLAINTIFF'S PRE-TRIAL POINTS AND
AUTHORITIES PURSUANT TO LOCAL
RULE 12

I.

Statement of Issues Raised by the Pleadings

The plaintiff, The Okonite-Callender Cable Company, Incorporated, a New Jersey corporation, hereinafter referred to as Okonite, brought this action against the Department of Water and Power to The City of Los Angeles and The City of Los Angeles to recover the sum of \$9,996.90, together with interest thereon, claiming that said amount is owing to the plaintiff from the defendants under and by virtue of a price adjustment or escalator clause

contained in a contract entered into between the plaintiff, Okonite, and the defendants pursuant to a [27] call for competitive bids for the manufacture of certain lead covered cable containing copper conductors complying with the specifications and requirements of the Department of Water and Power of The City of Los Angeles and The City of Los Angeles in their request for bids.

The only issue between the plaintiff and the defendants is as to the correct interpretation of the price adjustment clause as applied to certain monthly statistical information published by the United States Department of Labor. There is no controversy as to the publications themselves. The issue is a narrow one and resolves itself into which set of data contained in the Bureau of Labor publications is to be used in computing the increased price of materials under the price adjustment clause of the contract.

The defendants agree with the plaintiff that if plaintiff's construction of the escalator clause as applied to the Bureau of Labor Statistics is correct, that plaintiff is entitled to recover the sum of \$9,996.69 with interest. (Only 21c less than plaintiff claims in its Complaint, which slight amount plaintiff is, of course, willing to waive.) Plaintiff and defendants are likewise in agreement that if defendants' construction of the price adjustment clause as applied to the monthly Bureau of Labor data is correct, that plaintiff is not entitled to recover in any amount whatsoever.

Defendants' Answer admits that the plaintiff is a New Jersey corporation; that The City of Los Angeles and the Department of Water and Power of The City of Los Angeles are citizens of the State of California, and that the amount in controversy, exclusive of interest and costs, exceed \$3,000.

A comparison of the Complaint with defendants' Answer shows that there is no controversy other than as we have hereinbefore indicated. The Complaint alleged that the prices for said cable should be subject to adjustment upwards or downwards in the event of changes in labor costs and/or material costs as provided for in the price adjustment clause, and the Answer does not controvert these general allegations. Plaintiff pleaded the substance of the contract and the defendants have set out verbatim the portion of the contract containing the price adjustment clause. The Answer of defendants has gone further and has set up specific data from the U. S. Department of Labor publications, one of which will apply if plaintiff's contentions are correct and the other if defendants' contentions are correct. Paragraph IX of the Complaint alleges that during the period of said contract increases occurred in the cost of both labor and materials. That the two principal materials used in the manufacture of said cable were copper and lead. The percentage increases in said costs are then set out. Paragraph IV on Page 8 of defendants' Answer admits that the wholesale prices for "Group VI—Metals and Metal Products" compiled monthly by the United States Department of

Labor showed an increase in material costs. Defendants admit “that lead and copper constitute a large proportion of the materials used in the manufacture of said cable,” and thereafter in Paragraph IV defendants set out tabulations taken from the United States Bureau of Labor Statistics relating to copper and lead for the months involved in this contract and the percentage increase with respect to material is exactly in accordance with the percentage increases set out in Paragraph IX of plaintiff’s Complaint.

Paragraph X of plaintiff’s Complaint alleged:

“That plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price because of the materials used in said cable.”

Paragraph V of defendants’ Answer reads as follows:

“Answering the allegations of Paragraph X of plaintiff’s complaint these answering defendants admit and allege that plaintiff and defendants were and are unable to agree upon the amount of the increase of the [29] contract price, in accordance with the terms of Paragraph F 1.3, Price Adjustment Clause, of the contract heretofore alleged and set forth in Paragraph III of this answer, by reason of the increases in material costs.

Further answering the allegations of Paragraph X of said complaint, these answering defendants deny generally and specifically each

and every allegation contained and set forth in said Paragraph X not herein in this Paragraph V of this answer expressly admitted.”

Paragraph XI of the Complaint alleged that plaintiff duly and regularly filed a verified claim against the defendants for the amount sought to be recovered in this action. It was further alleged that the claim was allowed in part and the balance rejected without prejudice to the plaintiff or to the defendants, and that plaintiff has fully complied with all of the conditions of the contract. These general matters are admitted by the Answer. The Answer of the defendants correctly alleged that certain amounts were paid to the plaintiff under the defendants’ construction of the price adjustment clause. Some of these payments were made prior to the time when the plaintiff filed its claim against the Department of Water and Power of The City of Los Angeles and a part was paid upon a partial allowance of plaintiff’s claim. The details of these partial payments and credits which the defendants are entitled to are correctly set out in defendants’ Answer.

Defendants’ Answer sets out the base contract price of the bid items embodied in the cable contract between plaintiff and the defendants and the delivery dates provided for in the contract.

The dollar figures referred to in Paragraphs VI, VII, VIII, IX and X of defendants’ Answer are accurate as figures and are not here in controversy. They show the amounts heretofore paid either upon

invoices sent by the plaintiff or upon the claim filed by the plaintiff prior to the commencement of this action. As stated in the Complaint [30] there has been no controversy with respect to the computation in amounts under the price adjustment clause by reason of the increase in labor costs. Briefly summarized it therefore appears that defendants contend that plaintiff has been fully paid under the price adjustment clause, and plaintiff contends that under the price adjustment clause there is still due and owing to plaintiff the sum of \$9,996.69, by reason of increases in material costs.

II.

Provisions of the Contract Between the Plaintiff and the Defendants.

The Contract numbered 9317 is embodied in a printed and mimeographed document, a copy of which is filed herewith, prepared and issued by the Department of Water and Power of The City of Los Angeles. The subject matter of the contract is lead covered copper power cable. Bids were called for by the defendants to cover some 16 items of this type of cable. The plaintiff, The Okonite-Callender Cable Company, Incorporated, was the successful bidder on 6 of these items. After the bid was accepted by the defendants, the plaintiff Company furnished the necessary bond, affidavits, etc., and under date of May 21, 1946, signed the contract covering the items in question. The short printed form of contract, being the first document in the contract, was signed by R. A. Heffner, President, and Joseph L. Williams, Secretary of the

Board of Water and Power Commissioners of The City of Los Angeles, and by F. Cazenove Jones, President and Stephen A. Wilson, Secretary of The Okonite-Callender Cable Co., Inc.

There is no controversy between the plaintiff and the defendants as to any of the provisions of the contract, with the exception of the controversy with respect to the interpretation of the price adjustment or escalator clause. The specifications refer to the various kinds of lead covered cable, the conductors of which [31] shall be soft drawn copper of the kind and character specified on Sheet No. 1, being the first sheet following Page 12 of the contract. Detailed specifications are given in Sheets numbered 1, 2, 3, 4 and 5 following Page 12 of the contract. The shipments of the cable were made and accepted by the defendants. We are advised that the cost of the copper contained in the inside electrical conductors and the cost of the lead contained in the lead sheath, independent of labor thereon, constitute approximately 90% of the cost of all materials used in the manufacture of the cable.

The price adjustment clause or so-called escalator clause commences on Page 10 of the contract. It is numbered 1.3 and we quote the opening paragraph headed "Price Adjustment Clause," which will also be found on Page 4 in Paragraph III of defendants' Answer.

"1.3 Price Adjustment Clause: The contract price shall be subject to adjustment for changes in labor and/or material costs, such adjust-

ments to be determined in accordance with the following method, provided, however, that the price shall not be increased by virtue of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942.”

The important provisions relating to price adjustments of the contract because of materials are set forth on Pages 11 and 12 of the contract. These are likewise set out verbatim at the middle of Page 5 and continuing on Pages 6 and 7 of defendants’ Answer. For the convenience of the Court we quote the provisions of the price adjustment clause dealing with materials:

“2. Material:

a. For the purpose of adjustment, the proportion [32] of the contract price representing material is accepted as 50%.

b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for ‘Group VI—Metals and Metal Products’ compiled monthly by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly material

index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing material, as indicated above, and the result will be accepted as an increase in the contract price.

c. If the average monthly material index figure computed as provided in paragraph b, is less than the material index figure for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941 figure will be computed. The adjustment for decrease in material will be obtained by applying such percentage of decrease to the amount of the contract price representing material, as indicated above, and the result will be accepted as a decrease in the contract price.

“3. General:

a. The adjustment to which the contract price is subject will be determined as provided for above, except——

1. If shipment under this contract is extended more [33] than three months from the contract date as a result of causes beyond the reasonable control of the contractor, or because of fire, strike, civil or military authority, etc., the adjustment in contract price for changes in labor and material costs may at the option of the contractor be based on the period from

date of receipt of contractor's quotation to the date when complete shipment is made.

2. If the contract is modified, resulting in a change in contract price or contract date of shipment, the adjustment will be modified accordingly.

b. In determining the adjustment in contract price, the percentage of increase or decrease in labor and material costs will be calculated to the nearest 1/10th of 1%.

c. If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such events, the selection of substitute indices will be made by mutual agreement of the parties to this contract.

d. Payment for increase or credit for decrease in the contract price, resulting from the above will be deferred until the time for final payment under the terms of the contract.

“Ceiling for Expenditures: The total price shall not be increased under the foregoing price adjustment clause by more than 30 per cent over the original bid price.”

One other provision contained elsewhere in the contract may be mentioned, namely, that payments became due under the contract 30 days from the date of invoices subject to a discount of 1/2 of 1% for payment in 10 days from the date of invoice.

Plaintiff's argument with respect to the proper interpretation of the contract in the light of the subject matter of the contract and in the light of the Bureau of Labor Statistics will be covered in a subsequent portion of these Points and Authorities under the hearing of Argument.

III.

Bureau of Labor Statistics

The price adjustment or escalator clause in the contract, for the purpose of determining the increase or decrease of cost of materials used in the cable, refer to the source data "compiled monthly by the U. S. Department of Labor." Both the plaintiff and the defendants are in agreement that this source data is contained in Department of Labor monthly publications for each month beginning with April, 1946 and ending with March, 1947. These mimeographed reports by the U. S. Department of Labor are issued about the end of each calendar month. Considerably after the end of the year the Department then issues a permanent printed bulletin which combines the data contained in the monthly bulletins. For example, the Bulletin numbered 920 entitled "Wholesale Prices, 1946" which will be before the Court was not published until May of 1948 and this is considered by the Department the final data with respect to individual commodity wholesale prices, index numbers and index numbers of groups and subgroups of commodities for the year 1946. As stated, however, the contract refers to the monthly bulletins.

These monthly bulletins contain the data which plaintiff contends should be used under the price adjustment clause and they likewise contain the data which the defendants contend should be used under the price adjustment clause. The controversy, therefore, is a narrow one and resolves itself into the question as to which set of specific data given in the monthly publications should be used in [35] view of the provisions contained in the price adjustment clause.

The Department of Labor monthly bulletins are labeled "Average Wholesale Prices and Index Numbers of Individual Commodities," followed by the month and year and contain the average of the market prices for that month for each of about 850 major commodities. Each commodity has a permanent code or commodity number which does not change from month to month and the code number is merely for the convenience of identifying the particular commodity referred to. The monthly bulletin does not describe the particular commodity other than by a reference to its code or commodity number, but the annual bulletin such as Bulletin No. 920 covering the year 1946 gives to each commodity in the source data a code number followed by a description of the commodity. For example, the first commodity listed in the monthly bulletin bears code No. 1.1. A reference to the Bulletin No. 920 shows that this code number represents Barley, No. 2, malting, Minneapolis. The last commodity listed in the monthly bulletin has a code number of 784.1

which identifies it as Wax, crude white, f.o.b. New York refinery. The monthly bulletin refers to this code number as a "commodity number" in the left hand column. The annual bulletin refers to this number as "code number." Under this system, copper bears a code number of 472.1 and lead a code number of 473. (See Page 87 of the annual bulletin No. 920.) Other data issued by the Department of Labor classifies each commodity into one of three classes:

1. Manufactured articles;
2. Semi-manufactured articles;
3. Raw material.

Lead and copper are classified as semi-manufactured articles. Such articles as automobiles, farm machinery, etc., are classified as manufactured articles.

The monthly source data of the Department of Labor gives the commodity number in the first column, the next column to the right [36] gives the average price of that particular commodity for the month in question; the next column to the right gives the index number of the particular commodity. For example, copper identified by commodity number or code number 472.1 had an average price in January of 1946 of 12c per pound and it carried an index number of 85.4 for the same month. The index number gives a comparison of the 1946 price for that month as compared to the average price of that commodity in 1926 which for the purpose of index numbers is taken as equal to 100. If the monthly price for copper for example exceeds the

1926 base price, the index number would likewise exceed 100 and, generally speaking, where the price of a commodity increases month by month, the index number likewise increases month by month on a substantially parallel line. The commodity prices given in the Bureau of Labor data are often based upon different units of the product. For example, the prices with respect to copper and lead are given on the one pound unit. Quicksilver is given on the unit of a 76 pound flask. The prices on farm products are usually given by the bushel. Cattle, hogs, sheep, etc., by the 100 pounds. In order, however, to compare increases or decreases in prices of the various commodities listed in the Bureau of Labor data, current prices are related back to 1926 prices and for the same unit amounts index numbers are correspondingly given which then can be related to the index numbers of other commodities and thus index numbers of groups, subgroups, etc. are made available.

Obviously, the basic data therefore is the data relating to the individual commodity price and its individual index number. With this basic data any sort of grouping of the individual commodities may be made. The Bureau of Labor in addition to giving the individual commodity prices and index numbers for each separate commodity gives an index number of all the 860 commodities as an entire group and also gives index numbers of numerous subgroups. For example all commodities as a group (650 in number) had an index number of

141.5 for January, 1947, and index numbers for various subgroups, for example, farm [37] products for January, 1947, 165.0; dairy products as a subgroup under farm products 164.6, Metals and Metal Products as as one of the 10 subgroups 138.0; non-ferrous metals, a subgroup under Metals and Metal Products, 130.5. No average prices are given in the Bulletin as to all commodities as a group, or as to any of the main groups or subgroups, but prices are given only with respect to individual commodities.

Since the price adjustment clause in this contract refers to the monthly bulletins of the Bureau of Labor it was necessary to look to these bulletins which run from April, 1946 to March, 1947. Long afterwards, however, there was and now is available printed Bulletin No. 920 entitled "Wholesale Prices, 1946" which gives all of the data with respect to prices and index numbers of individual commodities and index numbers only of groups and subgroups for the entire year and for each month in the year of 1946. As stated, however, these annual permanent bulletins are not printed and issued, we are advised, until approximately two years after the year in question. (See transmittal letter in Bulletin No. 920 dated May 8, 1948 on the Wholesale Prices Bulletin No. 920 for 1946.)

A reference to certain pages of this Bulletin No. 920 will clearly illustrate what we have heretofore attempted to explain and will also clearly illustrate the narrow scope of the controversy which exists

between the plaintiff and the defendants. If the Court will turn to Pages 86 and 87 of Bulletin No. 920 it will be seen that these pages are a part of Table 12 entitled "Primary market prices, index numbers, and relative importance of individual commodities, 1946." The upper half of the table on Page 86 gives in the left hand column the code number of the individual commodity; the next column gives a description of the commodity and the terms of sale; the next column gives the unit on which the price is computed; the next twelve columns give the average primary market prices for each month in 1946; the last column gives the average [38] market price for the year. On Page 86 under the sub-heading "Nonferrous metals" will be found code number 472.1 Copper, electrolytic, delivered Connecticut Valley; the pound unit and the price of copper per pound for each month in 1946 being \$.120 in January and running up to \$.195 in December. Similarly for lead, code number 473 on the pound basis \$.065 per pound in January to \$.122 per pound in December. It will be noted that the subgroup "Nonferrous Metals" as a group contains no price data.

The lower half of this Table 12 is given on Page 87 and the heading is "Indexes (1926=100) Of Primary Market Prices, 1946." From it will be seen that code number 472.1 for copper carried an index number of 85.4 in January and rose to 138.8 in December. This indicates that for the months of January, February, March, April and May the

price of copper was below the 1926 price and in the following months was above the 1926 price. Another illustration on Page 86 is seen in quicksilver, code number 476, unit 76 pound flask, which had a price of \$106.50 in January but decreased to a price of \$88.375 in December. The lower half of the Table on Page 87 with respect to quicksilver shows that its index number in January was 143.6 indicating a price considerably above the 1926 price and it decreased to an index number of 94.9 in December indicating that it was then somewhat below the 1926 price.

It is the contention of the plaintiff that the price adjustment or escalator clause requires the use of the index numbers for copper and lead given in the monthly bulletins of the Department of Labor, a compilation of which may be seen for the months of 1946 on Page 87 of Bulletin No. 920. As stated, additional index numbers for January, February and March must be taken from the monthly bulletin. (We understand the 1947 annual printed bulletin is not yet available.) On the contrary, it is the defendants' contention that no reference whatsoever is to be made to the index numbers of lead and copper and that the price adjustment clause requires the use of the monthly [39] bulletin data relating only to the index numbers of the group of Metals and Metal Products as an entire group. Such an index number is given in the monthly publications of the Bureau of Labor. (See, for example, on Page 75 of Bulletin No. 920 where for Metals

and Metal Products as a whole, index numbers are given for each month in 1946 beginning with 105.7 in January to 134.7 in December.) But a glance at the upper portion of Table 12 on Page 74 will show that no prices are assigned to Metals and Metal Products as a group. Similar index numbers covering all the commodities as a whole and index numbers of the main groups under all commodities and the subgroups under the main groups could be taken from Table 1 on Pages 11 and 12 of Bulletin No. 920, but again no prices are given to such groups and subgroups.

We understand that the defendants agree with the plaintiff that if the index numbers of copper and lead are to be used, the plaintiff has selected the proper index numbers. On the other hand, the plaintiff and defendants are in agreement that if the index numbers for Metals and Metal Products as an entire group are to be used that the defendants have selected the proper figures from the Bureau of Labor tables. If defendants' data is used, the plaintiff has been paid in full and no additional amount would be recoverable in this action. On the other hand, if the plaintiff's data is to be used under the terms of the price adjustment clause, plaintiff is entitled to recover the sum of \$9,996.69, together with interest thereon.

The monthly Bureau of Labor publications, as stated, carry individual commodity prices and index numbers of approximately 850 individual items. There are 141 individual items grouped under

Metals and Metal Products. Of these 141 items, 111 are manufactured articles such as automobiles, farm machinery, etc., 27 are semi-manufactured articles (the class in which copper and lead fall) and 3 are classed as raw material. These facts and other data appearing in the monthly [40] and annual publications of the U. S. Department of Labor will be referred to in the portion of our Points and Authorities under the heading of "Argument." While the monthly publications to which the price adjustment clause refers do not contain a column which appears in Table 12 under the heading "Relative Importance, Year 1946," we wish to refer to this column in Bulletin No. 920 as a basis for comments which we may make under our heading of "Argument." On Page 39 of the Bulletin No. 920 at the commencement of Table 12 the Relative Importance for the year 1946 of all commodities is given as 100. Under the similar column throughout the Table are given the Relative Importance of the various groups and subgroups and the Relative Importance of each individual item. If the Court will turn to Page 76 of the Bulletin No. 920 it will be seen that the relative importance of Metals and Metal Products as a group is given as 13.32. This indicates that the Bureau of Labor has assigned this relative importance to the group of Metals and Metal Products with respect to all commodities taken as a whole. Page 87 of the Bulletin No. 920 shows that copper is given a relative importance with respect to all commodities of .47 and

lead of .15 and nonferrous metals as a group is given a relative importance of 1.69, whereas, immediately above it will be seen that Motor Vehicles as a group are given a relative importance of 5.21, indicating that under the Metals and Metal Products group as a whole, motor vehicles have a relative importance of approximately three times that of all of the nonferrous metals as a group. [41]

IV.

Argument

Since the contract here involved deals with the manufacture and sale of electrical cable composed mainly of copper and lead and since the contract contains a price adjustment or escalator clause for the adjustment upward or downward of the contract price depending upon the increased or decreased cost to the manufacturer of the material in the cable, the escalator clause should be construed to carry out the intentions of the parties. In order to arrive at such intention, the contract, its subject matter and the Bureau of Labor Statistics to which it refers must all be considered in order to arrive at a fair, just and reasonable interpretation of the price adjustment clause.

We think it is obvious that a reference to the Bureau of Labor Statistics showing the increase in the cost of copper and lead are far more appropriate and more accurate and more truly carry out the intentions of the parties than a reference to an entire group of Metals and Metal Products. As

we have heretofore stated, some 140 different commodities or articles, the greater proportion of which (110 out of 141) are strictly manufactured articles are grouped under the group of Metals and Metal Products. In these manufactured articles the price would be greatly affected by the labor involved in their manufacture. Lead and copper, however, while classed as semi-manufactured articles are not manufactured articles in any such sense as are automobiles, agricultural machinery, plumbing supplies, etc. There is no conceivable reason, that we can think of, why either the Department of Water and Power or The Okonite Company should deliberately choose a method of arriving at increased or decreased costs to the manufacturer which had no accuracy whatsoever and would not in fact be a true reflection of such increased or decreased costs. The accurate statistics covering copper and lead are as readily [42] available as the general average of the entire group of Metals and Metal Products. Defendants' Answer demonstrates this. On Page 10 of defendants' Answer the only index numbers that need to be taken from the Bureau of Labor Statistics to compute the increase or decrease of material costs based on copper and lead are those shown in Columns 2 and 3 for the months of April, 1946 to March, 1947. Defendants' contention with respect to the interpretation of the escalator clause would require the use of the index numbers set forth on Page 15 of defendants' Answer for the same months.

It cannot reasonably be argued that there is any convenience in the use of one set of index numbers over the other. On the other hand, this very litigation conclusively demonstrates the inaccuracy and inappropriateness of using the index numbers relating to Metals and Metal Products as a whole as distinct from those relating to lead and copper. On the defendants' construction of the escalator clause only approximately one-third of the actual additional costs of the lead and copper material in the cable would be taken into consideration, whereas, under the plaintiff's construction of the escalator clause the full increase or decrease in cost of copper and lead would be considered.

As the defendants' Answer shows there was no controversy with respect to the increase in labor costs. The escalator clause appropriately referred to Department of Labor Statistics relating to the increase or decrease in labor costs based on the index of hourly earnings of the electrical equipment manufacturing industry. (See Page 4 of defendants' Answer.) This constituted a reasonable, accurate and efficient method of determining either increased or decreased labor costs and plaintiff's construction of the escalator clause, which we believe to be correct, affords an equally reasonable, accurate and convenient method of determining the increases or decreases in costs of lead and copper containing in the cable.

Defendants' contention with respect to the escalator clause [43] would clearly have the effect of

substituting for an accurate method of determining increased or decreased material costs, a speculative, inaccurate and perhaps even a gambling contract between the manufacturer, The Okonite Company, and the defendant purchasers. It would almost be equivalent to saying that increased or decreased cost of material in the cable would be governed by the increased or decreased costs of diamonds in South Africa. It is not conceivable to us that the Department of Water and Power of The City of Los Angeles would propose or should by any possibility expect a contractor to interpret the escalator clause used in this contract to mean that if copper and lead decreased in price subsequent to the Base Month of April, 1946, whereas the composite group price of Metals and Metal Products had increased, that the contractor, where his manufacturing costs had decreased, would expect to receive from the Department of Water and Power and the Department of Water and Power would expect to pay a substantial added amount to the contract. The defendants may argue that this could not happen and that a reference to the Bureau of Labor figures as to Metals and Metal Products as a group would give an approximate measure of increased or decreased costs of any metal in this group. A slight reflection and a mere superficial examination of the Bureau of Labor Statistics will show the fallacy of such an argument. We have already heretofore pointed out one example with respect to quicksilver, one of the nonferrous metals under Metals and Metal

Products, which carried a price in April (the Base Month of the contract) of 104.50 per 76-pound flask and steadily declined in price until in December of that year the price was \$88.37½. (See Page 86 of Bulletin No. 920—upper half of Table.) Correspondingly in the lower half of the Table on Page 87 in will be seen that the index number of quicksilver correspondingly declined from 111.9 in April to 94.9 in December. It is obvious, therefore, that if the City had entered into a contract dealing with quicksilver listed as one of the metals in the Metals and Metal Products Group, [44] the manufacturer's costs would have been decreased and yet under defendants' construction of the escalator clause the Department of Water and Power would have paid a very substantial additional sum because of the general increase of the index numbers of Metals and Metal Products as a group.

If a person were merely interested in the general question of the increase or decrease of living costs or the general average of innumerable items or the general average of increased or decreased costs of the 140 items (mostly manufactured articles) under Metals and Metal Products, a consideration of the movement upward or downward of the group as a whole would be appropriate but here we are concerned with an escalator clause which the parties must have used not for speculative purposes but for the legitimate purpose of fairly adjusting the contract price depending upon increases or decreases in material costs in this cable. Due to the

postwar conditions and due to O.P.A. regulations then in force both parties knew of the shortage of materials and the impossibility of foreseeing over the future months of the contract the costs of material and of labor which would be involved in the manufacture of this cable. Doubtless it would have been impossible for the City of Los Angeles to obtain bids from responsible manufacturers of this cable without the device of an escalator clause, and if an escalator clause was reasonably called for such an escalator clause should be given a reasonable interpretation if it is in anywise to carry out the obvious purpose of such clauses and the intention of the parties.

We call the Court's attention to the fact that "Group VI—Metals and Metal Products," (Page 11 of the contract and quoted also on Page 5 of defendants' Answer) to which the escalator clause makes reference, nowhere appears in either the monthly publications by the Bureau of Labor or in its annual publication, other than in Table 11, Page 35 of Bulletin No. 920 which, obviously, was not the Table intended to be referred to since "Group VI" in that Table deals with [45] Material handling equipment such as industrial trucks, hand trucks, conveyors, hoists, freight elevators, locomotive cranes. And yet defendants' contention that the escalator clause refers to the group of Metals and Metal Products as a whole seems to us just as meaningless as it would be to refer to

“Group VI” of Table 11 dealing with power and hand trucks, conveyors and locomotive cranes.

When the contract was made there was an acute shortage of lead and copper. Under the heading Metals and Metal Products on Page 9 of Bulletin No. 920 the O.P.A. controls with respect to Metals and Metal Products are dealt with and it is stated: “Prior to decontrol, ceilings for copper, lead, and zinc were advanced. The shortages in these metals became more acute during the lapse of OPA controls and subsidies in July, with trading virtually at a standstill. * * * After controls were terminated in November, there were further sharp increases for basic nonferrous metals.”

Defendants undoubtedly will attempt to emphasize and greatly rely upon the quoted phrase “Group VI—Metals and Metal Products” contained in the escalator clause but in this same clause the Court will note the phrase “increases in material costs ” * * * “index of wholesale prices for Group VI—Metals and Metal Products.” (Under-scoring supplied.) The underscored words “wholesale prices” are nowhere given as to Metals and Metal Products as a group. The only prices which are given in the Bureau of Labor Statistics relate to individual commodities and taken as a whole it seems to us impossible to give to this escalator clause any such construction as it contended for by the defendants.

We have earlier pointed out that the general escalator clause (subsection c Page 12 of the con-

tract) (Page 7 of the Answer) provides that if for any reason the statistics compiled by the United States Department of Labor and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the [46] selection of substitute indices will be made by mutual agreement of the parties to this contract. Since the grouping of individual commodities in the Bureau of Labor Statistics is more or less arbitrary, it seems impossible to imagine that the parties to this contract could have found any other available statistics which would group under such a group as Metals and Metal Products all of the 141 items which are contained in the Bureau of Labor's group or that other available statistics would carry index numbers for the group as a whole. This would be extremely unlikely unless some other compiler of similar statistics would adopt wholesale the precise form that these statistics take under the publications issued by the Bureau of Labor Statistics. On the other hand, said subsection c is reasonably appropriate and adequate if the parties had in mind, as they must have had, the increase or decrease of the cost of copper and lead since these actual costs could be obtained from various sources.

As bearing upon the proper construction of the price adjustment or escalator clause b (Page 11 of the contract, Page 4 of the Answer) we call the Court's attention to the fact that this clause makes

reference to “monthly material index figures.” This phrase is used in clause b three times. It is used in the immediately following clause c dealing with a decrease in material costs an equal number of times. This phrase is not found anywhere in the Bulletin No. 920 or in the monthly bulletins compiled during the period covered by this contract. The heading of Table 12 on each page of the Table, beginning on Page 38 to the end thereof, uses the terms: “Primary market prices, index numbers, and relative importance of individual commodities, 1946.” The title of the Bureau of Labor publication mimeographed and printed monthly by the Bureau of Labor Statistics is entitled “Average Wholesale Prices and Index Numbers of Individual Commodities.” We do not contend that in and of itself the use in the price adjustment clause of the phrase “material index figures” as distinct from index numbers as used in the Bureau of Labor publications is of particular importance, [47] but it does establish that clauses b and c of the escalator clause in the contract are not artfully drawn and, therefore, it is unreasonable for the defendants to attempt to give any particular significance to the phrase “Group VI—Metals and Metal Products” as quoted in clause b, particularly when, as we have stated, the immediately preceding phrase is “index of wholesale prices” when in fact no wholesale prices are anywhere given either in the monthly or annual publication with respect to Metals and Metal Products as a group. Index numbers are

given but, of course, are based upon an average of all of the individual index numbers of the 141 commodities grouped under Metals and Metal Products. In our opinion, the only significance that can properly be given to the phrase "Group VI—Metals and Metal Products" is that it refers to a convenient place in the publication wherein the accurate index numbers of lead and copper may be found.

We have also pointed out that another clause designated as clause b which appears on Page 12 of the contract provides that in determining the adjustment in contract price the percentage of increase or decrease in labor or material costs will be calculated to the nearest 1/10th of 1%. If the City ever contemplated in a contract dealing with cable, mostly composed of copper and lead, that the yardstick to measure an adjustment of the contract price should be the group of Metals and Metal Products as a whole, such insignificant inaccuracy of 1/10th of 1% would be astonishing at the least. It is true that mathematical computations must stop at some decimal point, but this clause only would appear to make sense if the basic yardstick by which and adjustment of the contract price is to be measured is an accurate measure. Otherwise it is a good deal like having an escalator clause to adjust the price of gold per ounce down to 1/10th of 1% and then to provide that the gold in question shall be weighed upon crude scales where a matter of ounces could not be detected.

The Bureau of Labor itself admits that the index

numbers assigned to Metals and Metal Products as a group are subject to [48] important inaccuracies due to the fact that motor vehicles, one of the subgroups under the group of Metals and Metal Products, were not produced for civilian sale during World War II and consequently the Bureau of Labor Statistics carried forward the 1942 prices of Motor Vehicles through the month of September, 1946. Thereafter their actual prices were used in computing the tables and this immediately was reflected not only in the index numbers of motor vehicles as a subgroup but in the group of Metals and Metal Products as a whole. If the 1942 prices of motor vehicles had been carried throughout the year of 1946 the year's average index number for Metals and Metal Products would have been 112.3, whereas due to the change mentioned, the year's index number shown on Page 75 of the bulletin for Metals and Metal Products is 115.5. This artificial effect upon the index number of Metals and Metal Products as a group and of motor vehicles as a subgroup is explained in the footnote to Table I on Page 12 of Bulletin No. 920. These facts additionally demonstrate the unreliability and unreasonableness of referring to index numbers of Metals and Metal Products as a group as compared to referring to the index numbers of lead and copper in connection with the price adjustment clause under this contract. We may further point out that even the grouping of commodities in the Bureau of Labor indexes is to a large extent arbitrary

inasmuch as certain commodities are included in more than one commodity group and the Bulletin warns that this duplication must be kept in mind by anyone making special group indexes from the Bureau of Labor Statistics. (See Pages 2 and 3 of Bulletin No. 920.) It is there further stated "Thus prices of 23 commodities are included in both the farm and food indexes, and prices of 23 other commodities are included in both the metals and metal products and building materials groups."

We have already pointed out that of the 140 individual commodities or articles listed under Metals and Metal Products, for which individual prices are given in the upper half of Table 12 [49] and index numbers in the lower half of Table 12, approximately 110 of these commodities or articles are manufactured articles or commodities. For example, of the commodities listed under the Agricultural implements and farm machinery, the first subdivision under Metals and Metal Products, are strictly manufactured articles. Of those listed under the second subdivision, Iron and Steel, about 44 are strictly manufactured articles or products. Under the third subdivision, Motor Vehicles, passenger cars and trucks are both manufactured articles. Under the Nonferrous Metals Group, 9 are manufactured articles and 11 are semi-manufactured articles. Copper and lead are classed as semi-manufactured articles. Under the final subdivision of Plumbing and Heating, all 8 commodities are classed as manufactured articles. In the whole list

of Metals and Metal Products, 3 commodities are listed as raw material. Totaling these figures it appears out of approximately 140 articles or products listed under Metals and Metal Products 110 are manufactured articles, 27 semi-manufactured and 3 raw materials.

All of these facts when considered in connection with the obvious purpose of price adjustment or escalator clauses lead, we believe, to only one conclusion, namely, that the price adjustment clause is to be construed as referring to the increased costs of materials actually used in the lead and copper cable and not to any average increased costs of some 140 commodities most of which are manufactured and have no reasonable relation to copper and lead.

We were advised at a pre-trial conference with counsel for the Department of Water and Power that the defendants will offer in evidence certain interim invoices dealing with shipments of cable under the contract which contained computations from the Bureau of Labor Statistics relating to Metals and Metal Products as a group rather than to lead and copper. Their admissibility in evidence or their materiality is not conceded. Such invoices were in fact sent to the defendant, The Department of Water and Power. The contract, however, as we have pointed out specifically provides that the final payment [50] for increase or credit for decrease in the contract price resulting from the price adjustment clause "will be deferred until the time

of final payment under the terms of the contract.” (See subdivision d Page 12 of the contract.) After the final shipments of cable and in accordance with the contract, the plaintiff sent to the Department invoice No. C 247 dated September 29, 1947 headed “Adjustment of billings on Contract 9317-B in accordance with escalator clause,” with attached schedules which showed the increased price under the escalator clause based upon the copper and lead data given in the United States Department of Labor Statistics, and in this invoice there was a credit for all payments theretofore made under the interim invoices. The interim invoices containing additions under the price adjustment clause relating to the increased cost of materials accounts for only approximately \$1,283.01 of the total amount claimed by plaintiff under the price adjustment clause and said amount of \$1,283.01 was divided among said interim invoices. As we have stated, we do not know why the Department of Water and Power made any payments with respect to the escalator clause upon these interim invoices since the contract, as indicated, provided for an adjustment under the escalator clause at the time of final payment under the terms of the contract. Since the calculation under the escalator clause was at most a mere mathematical calculation it is not surprising and certainly not controlling that interim invoices failed accurately to reflect the true interpretation of the escalator clause. The Department of Water and Power has not claimed any prejudice

by virtue of these interim invoices and has, as we have stated, been given full credit for all amounts paid thereunder.

The fundamental rules to be followed in interpreting contracts are well settled and we think that it will be more than sufficient in this preliminary memorandum to merely refer to the more important California Code provisions dealing with this subject matter and one or two recent California cases. [51]

Section 1636, Civil Code of California

“Contracts, how to be interpreted. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”

Section 1639

“Interpretation of written contracts. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title.”

Section 1641

“Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

Section 1643

“Interpretation in favor of contract. A contract must receive such an interpretation as

will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”

Section 1648

“Contract restricted to its evidence object. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.” [52]

Where a contract is possibly susceptible of two interpretations, one of which is reasonable and fair and the other of which is unreasonable and will lead to absurd results, the latter interpretation must be discarded and the first accepted.

We quote from the case of *Cohn v. Cohn*, 20 Cal. (2d) 65 at 70 where the Supreme Court said:

“Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and \$94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of \$650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respondent will receive 45 per cent of the amount ‘available for distribution.’ Where one construction would make a contract unreasonable or unfair,

and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted.” (Emphasis added.)

Cohn v. Cohn, 20 Cal. (2d) 65 at 70. [53]

Without lengthening this memorandum to state the facts in the following cases, we quote portions of a few additional California cases dealing generally with the construction of contracts.

Universal Sales Corporation, Ltd. v. California Press Manufacturing Company, 20 Cal. (2d) 751, 761

“As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement (Civ. Code, Sec. 1647; Smith v. Carlston, 205 Cal. 541, 550, (271 Pac. 1091); Katz v. People’s Finance & Thrift Co., 101 Cal. App. 552, 558 (281 Pac. 1097); Meyers v. Nolan, 18 Cal. App. (2d) 319, 322 (63 P. (2d) 1216); 12 Am. Jur. 784, Sec. 247), including the object, nature and subject matter of the writing (First National Bank v. Bowers, 141 Cal. 253, 262 (74 Pac. 856); Weaver v. Grunbaum, 31 Cal. App. (2d) 42, 48 (87 P. (2d) 406); 12 Am. Jur. 776, Sec. 242), and the preliminary negotiations between the parties (Belfour v. Fresno Canal & Irr. Co., 109 Cal. 221, 226 (41 Pac. 876); 12 Am. Jur. 757, Sec. 234), and thus place itself in the same situation in which

the parties found themselves at the time of contracting. (Code Civ. Proc., Sec. 1860; *Tenant v. Wilde*, 98 Cal. App. 437, 445 (277 Pac. 137); *Pacific Indemnity Co. v. California Electrical Works, Ltd.*, 29 Cal. App. (2d) 260, 272 (84 P. (2d) 313); 17 C. J. S. 744, Sec. 321)."

Universal Sales Corp. v. Calif. Press Mrg. Co. 20 Cal. (2d) 751, 761. [54]

Yeremian v. Turlock etc, Co. Inc. 30 Cal. App. (2d) 92, 96

" 'A contract must receive such interpretation as will make it reasonable. (Civ. Code, Sec. 1643; 6 Cal. Jur., Contracts, Sec. 269, p. 271.) Here, the interpretation urged by defendant would render the contract unreasonable and unfair; and its language does not require such interpretation.' *Yeremian v. Turlock etc. Co. Inc.* 30 Cal. App. (2d) 92, 96.

Caletti v. State (1941) 45 C. A. (2d) 302, 305

"It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted. (*Stein v. Archibald*, 151 Cal. 220 (90 Pac. 536).) It would seem that here the correction was properly called into use, for it cannot be assumed the contractor was agreeing to take less pay for material actually handled, or that the state

was assuming to pay for more yardage than actually removed by the contractor.”

Caletti v. State (1941) 45 C. A. (2d) 302, 305.

The same rules for the construction of contracts announced by the foregoing California Code Sections and California cases are followed in the Federal cases. See, particularly, *Lesamis v. Greenberg* (CCA 9)* (1915) 225 Fed. 450, 451-452, re-affirmed 250 Fed. 848 (May 6, 1918 cc 9). Suit was brought by plaintiff to obtain the dissolution of the mining partnership between defendant, Tya-pay, Garbin and plaintiff and for an accounting. The three last named [55] persons deeded to defendant an undivided one-fourth of certain mining properties then held by them in consideration of the \$6,000 at the time paid by defendant and of \$24,000 to be paid to them by defendant “out of the first money taken out of the ground.” The parties commenced mining the properties as a partnership in March, 1910, and continued such operations until 1911 when a dispute arose resulting in this suit. The district court made certain findings and among other things found as to the \$24,000 deferred payment that it was payable from the net proceeds of the mining operation and not from defendant Greenberg’s one-fourth interest therein. In effect its holding was that the balance of the purchase price was to be paid from the net proceeds of the mining operation, i.e., that all of the net product of the mines was to be applied in discharge of such balance. The district court’s construction of this

instrument was predicated on the acts and conduct of the parties in their interpretation of its terms. The Ninth Circuit modified this finding stating that the district court was in error and that the contract was susceptible of no such construction. It further stated that the act or conduct of the parties in interpreting the instrument was not to be followed where the instrument could be interpreted by taking the four corners and viewing it as a whole. The court states:

“The District Court was induced, by reason of the acts of the parties and their seeming construction of the paper, to hold that such balance of the purchase price was to be paid from the net proceeds of the mining claims, which means that all the net products of the mines was to be applied in discharge of such balance. It must be conceded that the stipulation does not so read. It is plain that the payment does not become due until the money is taken out of the ground, and, by reason of the contingency, [56] might never mature. But the controlling idea respecting the construction of the paper is that Greenberg was purchasing a one-fourth interest only, and was to pay \$30,000 for that interest, \$6,000 of which he paid in cash. The balance he was to pay when the money was taken out of the ground; not he and his partners, nor the firm. He could pay that, therefore, only out of his interest in the money taken out of the ground. Otherwise his partners would be con-

tributing three-fourths of the money to pay his obligation to them. This could not have been intended, and the contract is susceptible of no such construction. Of course, the manner of the parties' treatment of the contract and its stipulation is often an aid to construction of the instrument, where the terms are ambiguous and their meaning involved. But, where the contract can be rendered by taking it by the four corners and viewing it as a whole, that manner of interpretation is most satisfactory, and should be adopted. So construing the contract, the plain meaning of the words 'of the first money taken out of the ground' is the first money taken out of the ground to which the grantee was entitled, which would be one-fourth of the amount so taken. And the intendment is that the first money shall be the gross amount to which the grantee is entitled, and not the net. We think therefore the trial court was in error in its interpretation of the contract." (Emphasis added.)

Lesamis v. Greenberg, 225 Fed. 450, 451, 452. [57] After this case was remanded, the District Court revised its findings in accordance with the opinion of the Circuit Court and thereafter a subsequent appeal was taken which is reported in 250 Fed. 848. The opinion was written by Circuit Judge Ross and concurred in by Circuit Judges Hunt and Gilbert reaffirming the opinion in 225 Fed. 450, and

actually quoting the portion of the opinion which we have hereinabove set out.

Conclusion

It is submitted that plaintiff's construction of the price adjustment clause contained in this contract makes it fair, accurate and reasonable, and that defendants' construction of the clause would make it unfair, unreasonable and inaccurate and would commit the parties to a pure speculation, separate and apart from any actual increased or decreased costs of the material embodied in the cable. Defendants' construction of the price adjustment clause, we submit, must obviously defeat its real purpose and the intention of the parties.

Respectfully submitted,

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY

By /s/ HENRY F. PRINCE,

Attorneys for Plaintiff, The
Okonite-Callender Cable
Company, Incorporated.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 18, 1949. [58]

[Title of District Court and Cause.]

DEFENDANTS' MEMORANDUM
PRIOR TO TRIAL

Statement of Facts

A contract was executed May 21, 1946, by the defendant Department of Water and Power of the City of Los Angeles, hereinafter called the "Department," and the Okonite-Callender Cable Co., Inc., a corporation, hereinafter called the "Plaintiff," for the furnishing and delivering to the Department by the plaintiff of six different sizes of paper insulated lead covered cable for \$91,096.00, which amount was to be adjusted on account of increases in labor costs and on account of [60] increases in material costs. Deliveries were begun and completed on the contract specified dates at Los Angeles of fixed quantities of each size of cable.

Section F 1.3 of the contract entitled "Price Adjustment Clause" (contract, pages 10 to 12), provided that the contract price (\$91,096.00) was subject to adjustment for changes in labor and/or material costs, to be determined as follows:

For the purpose of adjustment, the portion of the contract price representing labor was twenty per cent (\$18,219.20). This amount was to be adjusted for increases in labor costs based on the index of hourly earnings of the "Electrical Equipment" Manufacturing Industry, compiled monthly by the United States Department of Labor, Bureau of Labor Statistics. The average of monthly labor index figures for the period from the Base Month

(April, 1946), to and including the month specified for final shipment, was to be computed and the percentage increase, if any, secured by a comparison of the average monthly labor index figure, with the labor index figure for April, 1946. The percentage of increases was to be applied to the twenty per cent, and the result would be the amount of increase in the contract price on account of increases in labor costs. Provision was also made for decrease in labor costs, which is not pertinent here.

There is no issue in this case on the amount of increase in labor costs. Issue is joined on the proper interpretation of the contract provisions regarding the adjustment in the contract price for increases in material costs.

The "Price Adjustment Clause" further provided that for the purpose of adjustment of the contract price, the [61] portion of the contract price representing material was accepted at fifty per cent. Using this amount and April, 1946, as the "Base Month," the contract provided:

"The . . . amount . . . will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI-Metals and Metal Products' compiled monthly by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average

monthly material index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing material, as indicated above, and the result will be accepted as an increase in the contract price."

Payment for increase in the contract price resulting from these provisions was to be deferred until the time of the final payment under the terms of the contract, which was to be within approximately thirty days after delivery to the Department. The percentage of increase in labor and material costs was to be calculated to the nearest one-tenth of one per cent. The total price was not to be increased by more than thirty per cent, or \$27,-328.80, over the original bid price of \$91,096.00. Plaintiff's claimed adjustment is within the thirty per cent limit. It was further provided that the price was not [62] to be increased by virtue of the adjustment in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942. Deliveries were made between July 25 and November 9, 1946, while OPA was in effect.

Plaintiff furnished and delivered all of the material in accordance with the terms of the contract. The Department has paid the plaintiff \$91,-096.00, plus taxes, together with \$1,392.85 an account of increases in labor costs, plus taxes, and together with \$4,205.48 on account of increases in

material costs, plus taxes thereon, making a total payment by the Department to the plaintiff of \$96,694.33, plus taxes.

The United States Department of Labor, Bureau of Labor Statistics, compiled and published monthly an index of wholesale prices entitled "Index Numbers of Wholesale Prices by Groups and Subgroups of Commodities" (1926=100) for April, 1946, through March, 1947, which is the contract period involved, in a mimeographed release showing the index divided into ten groups, the sixth one of which is entitled "Metals and Metal Products." It also prepared Bulletin No. 920, "Wholesale Prices, 1946," printed by the United States Government Printing Office on page 11 of which appears Table 1, "Index Numbers of Primary Market Prices by Groups and Subgroups of Commodities, 1946," setting forth the monthly material index figures for April through December, 1946, for the sixth group, "Metals and Metal Products." For the remainder of the contract period of January, February and March, 1947, the index numbers for the ten groups, including the sixth group, "Metals and Metal Products," are in the mimeographed releases of the United States Department of Labor, Bureau of Labor Statistics, dated [63] February 25, 1947, March 26, 1947, April 23, 1947 (revised April 30, 1947) and May 22, 1947. These monthly material index figures so published and released monthly (April, 1946, through March, 1947) for the sixth group, "Metals and Metal Products" are as follows:

MONTHLY MATERIAL INDEX FIGURES

(Month)	(Group VI)	(Average)	(Increase)	(Increase)
Apr. 1946.....	108.8			
May.....	109.4			
June.....	112.2			
July.....	113.3			
Aug.....	114.0			
Sept.....	114.2			
Oct.....	125.8	114.0	5.2	4.8%
Nov.....	130.2			
Dec.....	134.7			
Jan. 1947.....	138.0	120.1	11.3	10.4%
Feb.....	137.9			
Mar.....	139.9	123.2	14.4	13.2%

The average of these monthly material index figures from April, 1946, to the months of October, 1946, and January and March, 1947, the months specified in the contract for final shipments are 114.0, 120.1 and 123.2, respectively. The amount of increase shown by the average monthly material index figure compared with the index figure for April, 1946, for these months specified for delivery, is 5.2, 11.3 and 14.4. The resulting percentage increase is 4.8%, 10.4% and 13.2%. [64]

Multiplying these percentages by fifty per cent of the unadjusted contract price of the material, delivery of which was to be completed in the months of October, 1946, and January and March, 1947, equals \$4,205.48, or the total amount of the adjustment for increases in material costs based upon the United States Department of Labor, Bureau of Labor Statistics, monthly compilation of index of wholesale prices for the sixth group, "Metals and Metal Products." This amount has been paid and defendants contend that amount is all that was pay-

able to plaintiff on account of increases in material costs under the contract.

The United States Department of Labor, Bureau of Labor Statistics, also publishes the "Monthly Labor Review," and the index of wholesale prices for the ten major groups and their subgroups for each month of the contract period of April, 1946, through March, 1947, are shown in the "Monthly Labor Review," Volume 62, No. 6, for June, 1946, through Volume 64, No. 5, for May, 1947, in Table No. 1, "Index of Wholesale Prices by Groups and Subgroups of Commodities," and Table No. 2, "Index Numbers of Wholesale Prices by Groups and Subgroups of Commodities." [65]

Points And Authorities

I.

The contract provision that the price will be adjusted for increases in material costs "based on the wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the United States Department of Labor" clearly means the "monthly material index figures" for the entire group and not any unnamed or unspecified individual commodity or commodities of the 115 commodities included in the five subgroups comprising the entire sixth major group of "Metals and Metal Products."

II.

This case is before the Court on the ground of diversity of citizenship and is governed by the law of the State of California.

28 U.S.C.A., § 1652.

Erie R. R. Co. v. Tompkins (April 25, 1938), 304 U.S. 64, 82 L. ed. 1188, 58 s. Ct. 817, 114 A.L.R. 1487.

Cole v. Loew's, Inc. (March 29, 1948, United States District Court, Southern District of California, Central Division), 76 Fed. Supp. 872, 874.

III.

The contract is not ambiguous, as this Court can determine its meaning without any other guide than a knowledge of the simple facts on which from the nature of language in general its meaning depends. [66]

It is not reasonably or fairly susceptible to different construction, which it must be to make it ambiguous.

17 C.J.S. 685-687, § 294.

The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity.

California Civil Code, Sec. 1638.

IV.

The contract is not ambiguous and no construction is allowable. A court will not resort to construction when the intent of the parties is expressed in clear and unambiguous language, but will enforce the contract according to its terms.

Ucovich v. Basile, Jr. (May, 1938), 26 C.A. (2d) 272, 277 13 C.J. 520.

V.

The contract is not ambiguous because the parties do not now agree upon the proper construction to be given its provisions.

National Pigments & Chemical Co. v. C. K. Williams & Co. (Eighth Circuit, 1938), 94 Fed. (2d) 792, 795.

VI.

The first rule respecting the interpretation of contracts is that the court may not apply one of the rules as an aid in its construction until the court is first satisfied that the language is fairly susceptible of two different [67] interpretations.

The court should not attempt to wrench the language from its ordinary meaning.

Beaumont v. Kittle Mfg. Co. (1932), 122 C.A. 547, 549.

VII.

Interpretation Of Contracts

“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”

California Civil Code, Sec. 1636.

“For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied.”

California Civil Code, Sec. 1637.

“When a contract is reduced to writing, the intention of the parties is to be ascertained from the

writing alone, if possible; subject, however, to the other provisions of this title.”

California Civil Code, Sec. 1639.

“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which [68] case the latter must be followed.”

California Civil Code, Sec. 1644.

Respectfully submitted,

/s/ RAY L. CHESEBRO,

City Attorney

/s/ GILMORE TILLMAN,

Chief Assistant City Attorney

Attorney for Water and

Power

/s/ RUSSELL B. JARVIS,

Assistant City Attorney

/s/ GERALD LUHMAN,

Deputy City Attorney

Attorneys for Defendants

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 18, 1949. [69]

In the District Court of the United States, Southern
District of California, Central Division
Honorable Leon R. Yankwich, Judge.

No. 8493-Y

THE OKONITE-CALLENDER CABLE CO.,
Incorporated,

Plaintiff,

vs.

DEPARTMENT OF WATER & POWER OF
THE CITY OF LOS ANGELES, etc.,
Defendant.

DECISION

The above entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment is ordered entered for the plaintiff in the sum of \$9996.69, together with interest thereon at the rate of 7% per annum from the first day of March, 1947, and costs.

Comment

I am of the view that the only reasonable interpretation of the "escalator" clause is one which makes the price adjustment dependent upon the cost of the component materials of the cable as contained in the index of prices for "'Metals and Metal Products' compiled monthly by the United States Department of Labor." The compilation which corresponds to this designation is that contained in Table 12, pages 74 et seq. of Bulletin No. 920, which is part of [71] Plaintiff's Exhibit 1, and which lists the price of lead and copper which constitutes over

90% of the materials which are combined into the cable. Any other construction, such as the construction which would make the price dependent upon the average of some 140 metals which are listed by the Department of Labor would be unrealistic. It is to be noted that, while the clause in the contract has the prefix "Group VI" before the designation, there is actually no such group in any of the documents before the court. The only manner in which it can be arrived at is by giving to the group summaries contained in Table 1 of the Labor Review of June, 1946, (Vol. 62, No. 6, p. 924) an arbitrary number which it does not bear. The designation in Column 1 of the Table is "Groups and Sub-Groups." The first designation under that title is "All Commodities." "Metals and Metal Products" is the seventh from the top. To give to it the numeral designation 6, we would have to omit the first designation "all commodities" from the document. We should not resort to such re-arrangements of official bulletins in order to make good a mistake that may have been made by some scrivener who thoughtlessly, in inserting stock clauses into a contract—boiler plate, as the defendant's counsel called them—gave a designation which did not appear in any of the official documents to which reference was made. Indeed, I feel that the only interpretation which saves this clause from complete nullity is the interpretation here adopted. As I stated at the trial, "cables" are not mentioned among the materials listed under "Metals and Metal Products." The only way of making the index applicable at all is to

take from it the prices of lead and copper which, as already stated, constitute more than 90% of the component parts of the cable. An examination of the cable shows that it is an [72] aggregate of metals each maintaining its form, capable of adequate measurement. As there is no fusion and change of structure of the component materials, the proportions can be, and actually were, computed mathematically.

And it is reasonable to assume that business persons dealing with such a commodity and providing for the adjustment of prices, had in mind as a basis the price of the component parts of this aggregate of two metals rather than the average of some 140 metals.

Hence the ruling above made.

Counsel for the plaintiff to prepare findings and judgment in conformity with Local Rule 7.

Dated this 28th day of February, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Feb. 28, 1949. [73]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled case having duly come on for trial on the 23rd day of February, 1949, at the hour of 10:00 o'clock a.m., before the Honorable Leon

R. Yankwich, Judge Presiding, Henry F. Prince, Esq., and Frederic H. Sturdy, Esq., of Gibson, Dunn & Crutcher appearing as counsel for plaintiff, and Russell B. Jarvis, Esq., Assistant City Attorney, and Gerald Luhman, Esq., Deputy City Attorney, appearing as counsel for defendants, and the said respective parties through their counsel having theretofore filed with the Court pre-trial memoranda under local Rule No. 12, and the Court having heard and considered the evidence, both oral and documentary, offered by the [74] respective parties, and the matter having been orally argued on February 24, 1949 by the respective attorneys for the parties, and the cause having been submitted to the Court for a decision, the Court being fully advised in the premises now makes its Findings of Fact as follows:

Findings of Fact

1. Plaintiff is now and was at all times herein mentioned a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of New Jersey, having its principal office at Paterson, N. J., and was and now is a citizen of the State of New Jersey.

Defendant, The City of Los Angeles, is now, and was at all times herein mentioned a municipal corporation duly organized, incorporated and existing under and by virtue of the laws of the State of California, having its principal office at Los Angeles, California, and said defendant was and now is a citizen of the State of California.

Defendant, Department of Water and Power of

the City of Los Angeles, is now, and was at all times herein mentioned, a department of The City of Los Angeles and was and now is a citizen of the State of California.

2. The amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

3. On or about the 21st day of May, 1946, plaintiff and defendant, Department of Water and Power of the City of Los Angeles, entered into a written contract wherein and whereby plaintiff agreed to manufacture, sell and deliver and said defendant agreed to purchase certain paper insulated, lead covered cable, more particularly described as follows:

Item VI—35,000 ft. No. 2/0 5000 volt, 3 conductor, stranded.

Item VII—48,000 ft. No. 6 AWG, 5000 volt, 3 conductor, stranded. [75]

Item X—2,000 ft. 1,500 MCM, 600 volt, single conductor, stranded.

Item XIV—76,000 ft. 1/0, 600 volt, single conductor, stranded.

Item XV—100,000 ft. No. 4 AWG, 600 volt, single conductor, stranded.

Item XVI—80,000 ft. No. 6 AWG, 600 volt, single conductor, stranded.

4. That in and by said contract it was agreed that said cable should be furnished at the following base prices:

Item VI	\$ 912.00 per M Ft., Total.....	\$31,920.00
Item VII	\$ 489.00 per M Ft., Total.....	\$23,472.00
Item X	\$1142.00 per M Ft., Total.....	\$ 2,284.00
Item XIV	\$ 185.00 per M Ft., Total.....	\$14,060.00
Item XV	\$ 120.00 per M Ft., Total.....	\$12,000.00
Item XVI	\$ 92.00 per M Ft., Total.....	\$ 7,360.00

5. That said contract provided that said lead covered cable would be delivered to the defendant, Department of Water and Power of The City of Los Angeles f. o. b. cars, Paterson, New Jersey, under the delivery schedule provided for in said contract as follows:

	Item No.	Beginning Date	Completion Date
VI	15 reels	July 1, 1946	
	10 reels	November 1, 1946	October 31, 1946
	10 reels	February 1, 1947	January 31, 1947
VII	} $\frac{1}{3}$	July 1, 1946	October 31, 1946
X		November 1, 1946	January 31, 1947
XIV		February 1, 1947	March 31, 1947
XV			
XVI			

6. That in any by said contract it was provided that the aforesaid base prices for said cable should be subject to adjustment in the event of changes in labor costs and material costs, or in the [76] event of changes in either labor costs or material costs. For the purpose of such adjustment, plaintiff and defendants agreed that the proportion of the contract price representing labor was twenty per cent (20%) of the contract price, and that the proportion of the contract price representing materials was fifty per cent (50%) of the contract price. During the term of said contract, plaintiff's labor costs substantially increased. Plaintiff and defendants were able to agree upon the amount of the increase

of the contract price with respect to labor under the provisions contained in said contract and said adjustment of the contract price because of the increase in labor costs is not in controversy. The controversy herein relates only to the price adjustment clause dealing with the increased costs of materials used by plaintiff in the manufacture of said cable.

7. Said contract further provided that payment for increase or credit for decrease in the contract price resulting from said price adjustment clause would be deferred until the time for final payment under the terms of the contract. Said contract further provided that the contract price should not be increased by virtue of the price adjustment clause by more than thirty per cent (30%) over the original bid price and that such increased price should not exceed the applicable maximum price established at the date of delivery by the O.P.A. pursuant to the Emergency Price Control Act of 1942. The Court finds that an increase in the contract price to the extent of the amount sued for by the plaintiff in this case will not cause the total increase to exceed thirty per cent (30%) over the original bid price and that such increased price will not exceed the applicable maximum price established at the date of delivery by the O.P.A., pursuant to the Emergency Price Control Act of 1942.

8. The Court finds that prior to the commencement of this action plaintiff duly and regularly filed and presented to the defendants a duly verified claim as required by law, claiming that said defend-

ants, and each of them, were indebted to the plaintiff in the amount herein sued for in addition to the amount of Three Thousand Six Hundred [77] Seventy-one and 56/100 Dollars (\$3,671.56) included in said claim, which latter amount was paid by the defendants prior to the commencement of this action. That defendants rejected the portion of plaintiff's claim herein sued on solely on the ground that defendants disagreed with plaintiff's contention with respect to the construction of the price adjustment clause contained in said contract. The Court finds that plaintiff has complied with all of the conditions necessary to entitle plaintiff to bring this action against the said defendants, The City of Los Angeles and the Department of Water and Power of The City of Los Angeles, and that plaintiff has duly performed all the terms and conditions of said contract on its part to be performed. That all of the cable described in said contract has been manufactured and delivered by plaintiff to defendants and that said defendants have accepted said cable.

9. A full, true and correct copy of the price adjustment clause contained in said contract is set out in Paragraph III of defendants' Answer and is as follows:

“1.3 Price Adjustment Clause: The contract price shall be subject to adjustment for changes in labor and/or material costs, such adjustments to be determined in accordance with the following method, provided however, that the price shall not be increased by virtue

of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942.

“1. Labor:

“a. For the purpose of adjustment, the proportion of the contract price representing labor is accepted as 20%.

“b. The above amount accepted as representing labor will be adjusted for increases in labor costs, such [78] adjustment to be based on the index of hourly earnings of the ‘Electrical Equipment’ manufacturing industry, compiled monthly by the U. S. Department of Labor, Bureau of Labor Statistics. The average of the monthly labor index figures for the period from the date of receipt of the Contractor’s proposal, April, 1946, (hereinafter referred to as the Base Month) to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly labor index figure with the labor index figure for the Base Month. The adjustment for increases in labor will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing labor, as indicated above, and the result will be accepted as an increase in the contract price.

“c. If the average monthly labor index figure computed as provided in paragraph b above

is less than the labor index figure for October, 1941, the percentage decrease of such average monthly labor index figure from such October, 1941 figure will be computed. The adjustment for decrease in labor will be obtained by applying such percentage of decrease to the amount of the contract price representing labor, as indicated above, and the result will be accepted as a decrease in the contract price.

“2. Material:

“a. For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

“b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for ‘Group VI—Metals and Metal Products’ compiled monthly [79] by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly material index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing material, as indicated above, and the result

will be accepted as an increase in the contract price.

“c. If the average monthly material index figure computed as provided in paragraph b, is less than the material index figure for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941 figure will be computed. The adjustment for decrease in material will be obtained by applying such percentage of decrease to the amount of the contract price representing material, as indicated above, and the result will be accepted as a decrease in the contract price.

“3. General:

“a. The adjustment to which the contract price is subject will be determined as provided for above, except—

“1. If shipment under this contract is extended more than three months from the contract date as a result of causes beyond the reasonable control of the contractor, or because of fire, strike, civil or military authority, etc., the adjustment in contract price for changes in labor and material costs may at the option of the contractor be based on the period from date of receipt of contractor's quotation to the date when complete shipment is made.

“2. If the contract is modified, resulting in a change [80] in contract price or contract date of shipment, the adjustment will be modified accordingly.

“b. In determining the adjustment in con-

tract price, the percentage of increase or decrease in labor and material costs will be calculated to the nearest 1/10th of 1%.

“c. If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the selection of substitute indices will be made by mutual agreement of the parties to this contract.

“d. Payment for increase or credit for decrease in the contract price, resulting from the above will be deferred until the time for final payment under the terms of the contract.

“Ceiling for Expenditures: The total price shall not be increased under the foregoing price adjustment clause by more than 30 per cent over the original bid price.”

10. That at the time of plaintiff's bid and at the time the said bid was accepted and at the time of the entering into of the said contract there was an extreme shortage of lead and copper and plaintiff did not have on hand at said times or any of them sufficient lead and copper, or either of them, to manufacture said cable. That at said time and for a number of months thereafter the purchase and use of lead and copper by manufacturers was controlled by the United States Government and plaintiff was able to purchase from time to time only sufficient amounts of lead and copper to meet current

manufacturing requirements and deliveries under the contract between the plaintiff and the defendants. That plaintiff using reasonable diligence and subject [81] to Government regulations purchased from time to time the amount of lead and copper required in the manufacture of said cable, but in doing so was reasonably required to pay and did pay for said lead and copper prices in excess of the market price of said lead and copper in the month of April, 1946, and said excess actual cost was substantially more than the amount which plaintiff seeks to recover herein by virtue of said price adjustment clause, and substantially more than the amount herein sought to be recovered added to all payments heretofore made by defendants to plaintiff on account of said price adjustment clause.

That the cost of the lead and copper used in the manufacture of all said items of cable as a group amounted to slightly in excess of ninety per cent (90%) of the total cost of all material used in said cable.

11. That the index of wholesale prices compiled monthly by the United States Department of Labor referred to in the said contract under paragraph 2 Material, subparagraph b of the price adjustment clause, means and was intended to mean the monthly mimeographed publication of the United States Department of Labor, Bureau of Labor Statistics, entitled "Average Wholesale Prices and Index Numbers of Individual Commodities," herein in these Findings also referred to as "Index Numbers of Individual Commodities." That the language

used in said price adjustment clause with respect to said "Index Numbers of Individual Commodities" was intended to and does refer to the index numbers of copper, being commodity No. 472.1 and lead, being commodity No. 473, said copper and lead being two of the group of nonferrous metals which said group of nonferrous metals is a subgroup under Metals and Metal Products in said "Index Numbers of Individual Commodities." That said "Index Numbers of Individual Commodities" does not contain any "Group VI" as quoted in the price adjustment clause herein referred to. That Metals and Metal Products as a group is, however, listed therein as one of the subgroups under "All Commodities." [82] That under said group of Metals and Metal Products in said "Index Numbers of Individual Commodities" there are listed approximately 140 separate commodities, most of which are manufactured commodities of many different types. Said provisions of said price adjustment clause with respect to increases and decreases in material costs were not intended to and do not refer to said Metals and Metal Products as a group or subgroup for the purpose of taking the index numbers of Metals and Metal Products as a group for use in computing any increase or decrease of the contract price, but said reference in said price adjustment clause to Metals and Metal Products was intended solely as a reference to the appropriate place in said "Index Numbers of Individual Commodities" under which the index numbers for copper and lead were to be

found. That copper and lead are the only metals in said cable.

12. That the monthly mimeographed publications of the United States Bureau of Labor Statistics entitled "Average Wholesale Price and Index Numbers of Individual Commodities" (herein also referred to as "Index Numbers of Individual Commodities") for the months of January, February and March of 1947, introduced in evidence as a part of plaintiff's Exhibit 1, are examples of the publications intended to be referred to by the price adjustment clause of said contract as the proper source from which are to be taken the index numbers relating to lead and copper as constituting the material used in said cable.

That Bulletin No. 920, a part of plaintiff's Exhibit 1, contains for each month of 1946 the index numbers of lead and copper as theretofore issued monthly in said "Average Wholesale Prices and Index Numbers of Individual Commodities," and table 12, Page 74 et seq., of said Bulletin No. 920 which lists on Pages 86 and 87, the index numbers of copper Code No. 472.1 and lead Code No. 473 and the same items in the monthly publication "Average Wholesale Prices and Index Numbers of Individual Commodities" for January, February and [83] March, 1947, a part of plaintiff's Exhibit 1, contain the proper index numbers to be used in computing the increases in material costs under the price adjustment clause of said contract.

That the monthly publication entitled "Labor

Review” introduced in evidence as defendants’ Exhibit O is not the monthly publication or an example of the monthly publication referred to or intended to be referred to by the provisions of the price adjustment clause of said contract. The said Labor Review contains only a reprint of portions of said “Average Wholesale Prices and Index Numbers of Individual Commodities” and said reprint is not up to date when published.

13. That under the terms and provisions of said price adjustment clause, the parties plainly intended to disregard all non-metallic components contained in said cable. The sole metallic components of said cable are lead and copper and the Court finds that whenever said price adjustment clause in said contract refers to “material” or “increases in material costs” or “decreases in material costs” or similar words or phrases, the word “material” or “materials” refers to copper, electrolytic, delivered Connecticut Valley, and lead, pig, desilverized, f. o. b. New York, which are the principal component parts of the cable referred to in said contract.

14. The Court further finds that the contract specifications with respect to the quality or type of copper and lead to be used in said cable are identical with the quality or type of copper bearing commodity No. 472.1 (copper, electrolytic, delivered Connecticut Valley), and lead bearing commodity No. 473 (lead, pig, desilverized, f. o. b. New York), two of the nonferrous metals under the general

subgroup of Metals and Metal Products contained in said United States Bureau of Labor Statistics entitled "Average Wholesale Prices and Index Numbers of Individual Commodities."

15. The Court further finds that the percentage of increase of the index numbers relating to copper and lead in said Bureau of [84] Labor "Index Numbers of Individual Commodities" referred to in said contract, computed in accordance with the terms and provisions of said price adjustment clause were for the period from April, 1946 (the Base Month) to and including October, 1946 17.6%; and for the period from April, 1946 (the Base Month) to and including January 31, 1947 33.2%; for the period from April, 1946 (the Base Month) to and including the month of March, 1947 43.2%. That relating said percentage increases to the contract price as provided for in said price adjustment clause, the Court finds that plaintiff is entitled to a price increase in the amount of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars (\$9,996.69), in addition to all amounts heretofore paid by defendants to plaintiff. Accordingly, the Court finds that plaintiff is entitled to recover from the defendants the sum of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars (\$9,996.69), together with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of May, 1947.

16. The Court finds that the construction of the price adjustment clause of said contract contended for by defendants would render said price adjust-

ment clause unfair, unreasonable, inaccurate and speculative; while on the other hand the construction of said price adjustment clause contended for by plaintiff, and herein found by the Court to be the correct construction, renders said clause reasonable, fair and definite and is the only construction which the parties as reasonable business men could have had in contemplation at the time when said contract was entered into.

17. The Court finds that if there are any allegations contained in the Answer of the defendants which are in conflict with the Findings herein made that said allegations are not true or correct.

Upon the foregoing Findings of Fact the Court makes the following: [85]

Conclusions of Law

The Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact.
2. Any conclusion of law that is contained in the foregoing Findings of Fact is hereby expressly incorporated in these Conclusions of Law although not herein expressly referred to.
3. That said price adjustment clause properly construed was intended to refer to and requires a reference to and use of the individual commodity index numbers of copper, Commodity No. 472.1, and lead, Commodity No. 473, in said "Average Wholesale Prices and Index Numbers of Individual Commodities" as published monthly in mimeographic form by the United States Bureau of Labor Statis-

tics at Washington, D. C., from and including April, 1946 to and including March, 1947. That said price adjustment clause does not refer to and was not intended to refer to any index numbers of Metals and Metal Products as a group or subgroup in said publications.

4. That in accordance with the correct construction of said price adjustment clause the plaintiff is entitled to judgment against the defendants in the sum of Nine Thousand Nine Hundred and Ninety-six and 69/100 Dollars (\$9,996.69) with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of May, 1947 to the date of judgment herein and that plaintiff is also entitled to recover its costs herein incurred. [86]

Let Judgment be Entered Accordingly.

Dated this 14th day of March, 1949.

/s/ LEON R. YANKWICH,

Judge of the District Court
of the United States.

Presented by and approved:

/s/ HENRY F. PRINCE,

Of Gibson, Dunn & Crutcher,
Attorneys for Plaintiff.

Approved as to form:

.....,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 14, 1949.

In the District Court of the United States in and
for the Southern District of California
Central Division

Civil No. 8493-Y

THE OKONITE-CALLENDER CABLE COM-
PANY, INCORPORATED,

Plaintiff,

vs.

DEPARTMENT OF WATER AND POWER OF
THE CITY OF LOS ANGELES; THE CITY
OF LOS ANGELES, a municipal corporation,
Defendants.

JUDGMENT FOR MONEY DUE UNDER
CONTRACT

The above entitled case having duly come on for trial on the 23rd day of February, 1949, at the hour of 10:00 o'clock A.M., before the Honorable Leon R. Yankwich, Judge Presiding, Henry F. Prince, Esq., and Frederic H. Sturdy, Esq., of Gibson, Dunn & Crutcher appearing as counsel for plaintiff, and Russell B. Jarvis, Esq., Assistant City Attorney, and Gerald Luhman, Esq., Deputy City Attorney, appearing as counsel for defendants, and the said respective parties through their counsel having theretofore filed with the Court pre-trial memoranda under local Rule No. 12, and the Court having heard and considered the evidence, both oral and documentary, offered [89] by the respective parties, and the matter having been orally argued

on February 24, 1949, by the attorneys for both parties, and the cause having been submitted to the Court for a decision, and the Court being fully advised in the premises, and having made and filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, by reason of the law and findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover from the defendants the sum of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars (\$9,996.69), together with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of May, 1947 to the date hereof, in the amount of \$1,306.21, and that plaintiff also have judgment against the defendants, and each of them, for its costs herein taxed in the sum of \$39.98.

Dated this 14th day of March, 1949.

/s/ LEON R. YANKWICH,

Judge of the District Court
of the United States.

Presented and approved:

By /s/ HENRY F. PRINCE,

Of Gibson, Dunn & Crutcher,
Attorneys for Plaintiff.

Approved as to form:

.....,

Attorneys for Defendants.

[Title of District Court and Cause.]

PLAINTIFF'S COMPUTATION OF INTER-
EST ON THE AMOUNT OF JUDGMENT
PURSUANT TO LOCAL RULE NO. 7.

Plaintiff and defendants are in agreement that as a matter of computation interest at the rate of seven per cent (7%) per annum should run from the 1st day of May, 1947 (rather than from the 1st day of March, 1947, as prayed for in the Complaint) on the principal amount of the judgment for Nine Thousand Nine Hundred and Ninety-six and 69/100 Dollars (\$9,996.69) found to be due from the defendants to the plaintiff.

Plaintiff's computation of said interest from said 1st day of May, 1947 up to the 14th day of March, 1949 (estimated by plaintiff to be the date when the judgment will be signed by the Court) is One Thousand Three Hundred Six and 21/100 Dollars (\$1,306.21). [91]

The daily rate of interest on said principal sum is One and 91/100 Dollars (\$1.91) so that in the event said judgment is not signed on the 14th day of March, 1949 additional interest in the amount of One and 91/100 Dollars (\$1.91) per day should be added to said amount of One Thousand Three Hundred Six and 21/100 Dollars (\$1,306.21).

Dated this 7th day of March, 1949.

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,

By /s/ HENRY F. PRINCE,
Attorneys for Plaintiff.

Received copy of the foregoing Plaintiff's Computation of Interest this 7th day of March, 1949, at two o'clock P.M.

RAY L. CHESEBRO,

City Attorney.

By GERALD LUHMAN,

Deputy,

Attorneys for Defendants.

Judgment entered Mar. 15, 1949.

Docketed Mar. 15, 1949.

Book 56, page 634.

EDMUND L. SMITH,

Clerk.

By C. A. SIMMONS,

Deputy.

(Receipt of Copy acknowledged.)

[Endorsed]: Filed March 14, 1949. [92]

At a stated term, to wit: The February Term, A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the second day of May in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: Leon R. Yankwich,
District Judge

[Title of Cause.]

For hearing motions filed March 25, 1949, (1) for new trial, (2) to set aside findings and conclusions, and (3) to vacate and set aside judgment; H. F. Prince and F. H. Sturdy, Esqs, appearing as counsel for plaintiff; R. B. Jarvis, Asst. City Att'y, and Gerald Luhman, Deputy City Att'y, appearing as counsel for defendant City of Los Angeles;

Attorney Jarvis argues to the Court. Deft's Ex. A, B, C, and D on hearing are marked, and admitted in evidence for illustration only, said exhibits being charts.

Attorney Prince argues to the Court. Court orders motions 1, 2, and 3 each denied. [126]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The City of Los Angeles, a municipal corporation, and Department of Water and Power of the City of Los Angeles, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on March 15, 1949.

Dated: Los Angeles, California, May 27, 1949.

/s/ RAY L. CHESEBRO,

City Attorney.

By GILMORE TILLMAN,

Chief Assistant City Attorney
for Water and Power.

By RUSSELL B. JARVIS,

Assistant City Attorney.

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 27, 1949. [130]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY DEFENDANTS AND AP-
PELLANTS

To the Clerk of the Above-Named Court:

The Department of Water and Power of the City of Los Angeles and the City of Los Angeles, a municipal corporation, defendants and appellants herein, do hereby designate to be contained in the record on appeal in the above-entitled action the complete record and all the proceedings in the above-entitled action, including "Plaintiff's Pre-Trial Points and Authorities Pursuant to Local Rule 12" and "Defendants' Memorandum Prior to Trial," and all the evidence and proceedings at the trial of the above-entitled action, which was tried

on February 23, 1949, and February 24, 1949, in question and answer form, and all exhibits introduced and received in evidence [131] herein, and also including the decision of the Court filed herein February 28, 1949, excepting and excluding from the foregoing designation only the following:

1. "Defendants' Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law."

Dated: June 14, 1949, Los Angeles, California.

/s/ RAY L. CHESEBRO,

City Attorney.

By GILMORE TILLMAN,

Chief Assistant City Attorney
for Water and Power.

By RUSSELL B. JARVIS,

Assistant City Attorney.

Attorneys for Defendants
and Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1949. [132]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY PLAINTIFF AND AP-
PELLEE

To the Clerk of the Above-Named Court:

Defendants and Appellants, Department of
Water and Power of the City of Los Angeles and

The City of Los Angeles, a municipal corporation, filed on June 14, 1949, a Designation of the Contents of Record in which they designated the portions of the record they desired to be included on appeal in the above entitled action. It is believed that this designation covers all of the record necessary, but in order that the Clerk may be more fully informed as to exactly what papers and documents the plaintiff and appellee, The Okonite-Callender Cable [134] Company, Incorporated, specifically desires, it does hereby designate to be contained in the record on appeal in the above entitled action, the following papers:

1. The material pleadings on file herein.
2. Plaintiff's pre-trial points and authorities pursuant to Local Rule 12.
3. Defendants' memorandum prior to trial.
4. The Findings of Fact and Conclusions of Law.
5. The decision and opinion of the District Judge, dated February 28, 1949.
6. The Judgment herein appealed from dated March 14, 1949.
7. Notice of Appeal by defendants and appellants herein dated May 27, 1949.
8. The reporter's transcript of all the evidence and proceedings at the trial of the above entitled action which was tried on February 23, 1949 and February 24, 1949, in question and answer form.
9. Plaintiff's exhibits 1 to 3 inclusive, and defendants' exhibits A to O inclusive, all of which were introduced and received in evidence herein.

Dated at Los Angeles, California, this 21st day of June, 1949.

STEPHEN A. WILSON
GIBSON, DUNN & CRUTCHER
HENRY F. PRINCE
FREDERIC H. STURDY
By HENRY F. PRINCE,
Attorneys for Plaintiff and
Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1949. [135]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE APPEAL

It Appearing that an appeal has been taken by the defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, from the judgment entered herein by filing their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on May 27, 1949, and that the plaintiff and appellee and said defendants and appellants have served and filed their respective designation of the portions of the record, proceedings and evidence to be contained in the record on appeal herein, and that additional time is required in making up the record on appeal, as requested by defendants and appellants; [137]

It Is Ordered that the time for filing the record on the appeal of defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, herein and for docketing the appeal taken herein by said defendants and appellants is extended from the 6th day of July, 1949, to and including the 6th day of August, 1949.

Dated this 24th day of June, 1949.

/s/ LEON R. YANKWICH,

Judge of the District Court
of the United States.

Receipt of copy acknowledged.

[Endorsed]: Filed June 24, 1949. [138]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE APPEAL

It Appearing that an appeal has been taken by the defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, from the judgment entered herein by filing their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on May 27, 1949, and that the plaintiff and appellee and said defendants and appellants have served and filed their respective designation of the portions of the record, proceedings and evidence to be contained in the

record on appeal herein, and that additional time is required in making up the record on appeal, as requested by defendants and appellants; [139]

It Is Ordered that the time for filing the record on the appeal of defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, herein and for docketing the appeal taken herein by said defendants and appellants is extended from the 6th day of August, 1949, to and including the 25th day of August, 1949.

Dated this 3rd day of August, 1949.

/s/ LEON R. YANKWICH,

Judge of the District Court
of the United States.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 3, 1949. [140]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 140, inclusive, contain the Complaint for Money Due on Contract; Answer; Plaintiff's Pre-Trial Points and Authorities Pursuant to Local Rule 12; Defendants Memorandum Prior to Trial; Decision of the Court; Findings of Fact and Conclusions of Law; Judgment for Money Due Under Contract; Defendants Motions for a

New Trial, Setting Aside and Amending Findings of Fact and Conclusions of Law and Altering and Amending and Vacating and Setting Aside Judgment, Points and Authorities in Support Thereof; Memorandum of Plaintiffs Points and Authorities in Opposition to Defendants Motions for a New Trial, etc.; Stipulation for Stay of Execution and Order Thereon; Notice of Appeal; Designation of Contents of Record on Appeal by Defendants-Appellants; Designation of Contents of Record on Appeal by Plaintiff-Appellee; Order Extending Time for Filing the Record on Appeal and Docketing the Appeal filed June 24, 1949; Order Extending Time for Filing the Record on Appeal and Docketing the Appeal, filed August 3, 1949; and full, true and correct copy of Minute Order Entered May 2, 1949, which together with copy of reporter's transcripts of proceedings on February 23, 1949 and February 24, 1949, and original Plaintiff's Exhibits 1, 2 and 3 and the original Defendants Exhibits A through O inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by the appellant.

Witness my hand and the seal of said District Court this 24th of August, A.D., 1949.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ EDWARD T. DREW,
Deputy.

In the District Court of the United States, in and
For the Southern District of California, Central Division

No. 8493-Y Civil

THE OKONITE-CALLENDER CABLE
COMPANY, INCORPORATED,

Plaintiff,

vs.

DEPARTMENT OF WATER AND POWER OF
THE CITY OF LOS ANGELES; THE CITY
OF LOS ANGELES, a Municipal Corporation,
Defendants.

Honorable Leon R. Yankwich, Judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

February 23, 1949

Appearances:

For the Plaintiff:

STEPHEN A. WILSON, Esq.

GIBSON, DUNN & CRUTCHER

HENRY F. PRINCE, Esq.

FREDERIC H. STURDY, Esq.

634 South Spring Street

Los Angeles 14, California; by

HENRY F. PRINCE, Esq.

For the Defendants:

City Attorney

GILMORE TILLMAN

Chief Assistant City Attorney for
Water and Power

RUSSELL B. JARVIS

Assistant City Attorney

GERALD LUHMAN

Deputy City Attorney

207 South Broadway,

Los Angeles, California; by

RUSSELL B. JARVIS, Esq. [2*]

Los Angeles, California; February 23, 1949,
10:00 o'Clock A.M.

ALBERT F. METZ

called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and
testified as follows:

The Clerk: Will you state your name, please?

The Witness: Albert F. Metz.

Direct Examination

By Mr. Prince:

Q. Mr. Metz, what position did you hold with
the plaintiff the Okonite-Callender Cable Company,
Inc., in April 1946?

A. Vice president and treasurer.

Q. What position do you hold with them now?

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Albert F. Metz.)

A. The same position, vice president and treasurer.

Q. How long have you been connected with that Company?

A. Since its inception in 1924.

Q. Have you had occasion to make a calculation of the lead and copper compared with other material involved in the contract? A. Yes.

Mr. Jarvis: May I ask that the answer go out?

Mr. Prince: My question is based upon the cost of new material.

Mr. Jarvis: We object upon the ground the question is [4] immaterial.

The Court: It is merely preliminary.

Mr. Jarvis: We think it is irrelevant and immaterial. The contract speaks for itself. It is not necessary to resort to extrinsic evidence to determine the meaning.

The Court: Overruled.

(Question read by the reporter.)

A. That is correct.

Q. (By Mr. Prince): That is, the cost of them?

A. Yes.

Q. What was the result, Mr. Metz?

Mr. Jarvis: I object to this question upon the same ground previously stated. Also upon the ground that the cost is indefinite as to the cost to whom, and based upon what cost.

The Court: I think you had better lay a better foundation.

(Testimony of Albert F. Metz.)

Q. (By Mr. Prince): As to the April cost price of copper and lead and other material in the cable, can you state what the costs were of copper and lead and whatever insulating material was in the cable as of that date—is the question of the purchase of material and cost and computation of the amount of lead and wire under your general jurisdiction? A. Yes.

Q. It has been for many years? [5]

A. Yes.

Q. As a matter of fact, you know or your own knowledge what the cost of the different material is? A. That is correct.

Mr. Prince: I will stipulate that the same objection may be made to all of this testimony.

Mr. Jarvis: I would like to renew my objection.

The Court: The objection is overruled.

A. The cost of copper and lead was 90 per cent of the cost of all material used in the cable.

Q. (By Mr. Prince): When this contract was entered into in May, did your company have on hand a sufficient quantity of copper and lead to cover this contract? A. No.

Mr. Jarvis: We ask that the answer go out. We have the same objection, that it is irrelevant and immaterial.

The Court: I will hear the evidence on the subject. I think the factual basis is very limited.

Q. (By Mr. Prince): The question is, did you have sufficient copper and lead on hand to meet the

(Testimony of Albert F. Metz.)

requirements of this contract as of the time the bids were put in, or the time the contract was entered into, in May 1946? A. No.

Q. How were you able to acquire the copper and lead necessary for the contract?

Mr. Jarvis: Same objection.

The Court: Overruled. [6]

A. Copper and lead at that time were controlled by the government, and you were only permitted to have what copper and lead you could use for your production in the following month.

Q. The result was that you had to purchase from time to time your copper and lead requirements?

A. That is correct.

Q. Can you say the approximate amount for copper and lead that you had to pay over and above the April and May quotations for copper and lead?

Mr. Jarvis: I would say that may be out of order, your Honor. In the orderly procedure we should have the contract in evidence and introduced for the court to determine whether it is material for the court to hear this type of evidence.

(Discussion.)

The Court: Overruled.

Q. (By Mr. Prince): What was the actual cost of the copper and lead over the April prices?

A. The increase in the cost of copper and lead material was about \$24,000.

Q. The contract specifies the type of lead and copper in the cable? A. Yes.

(Testimony of Albert F. Metz.)

Q. In the specifications copper is given at 472.1 and lead as 473, in the Bureau of Labor Statistics figures? [7] A. Yes.

Mr. Jarvis: This appears to be only for the Department of Labor specifications, rather than the Water and Power specifications.

Mr. Prince: No, I want to know whether the specifications in that contract would be complied with in the way of furnishing copper and lead under the price quoted under the Bureau of Labor specifications.

Mr. Jarvis: That is arguing the matter. This is the specific contract involved here which would be determinative of what type of cable was required to be furnished. Is that correct?

A. Yes.

Mr. Prince: That is all.

The Court: Cross-examine.

Mr. Jarvis: Upon the grounds which we have specified in our objections we move to strike all the testimony of Mr. Metz on direct examination.

The Court: Motion denied.

Cross-Examination

By Mr. Jarvis:

Q. Do you have any figures with you, Mr. Metz, as to the computation which you made to price?

A. No, I have no figures with me as to the calculation of the cost of the copper that was used.

Q. It is a fact that as to the proportionate quantity of lead and copper in the manufacture of the

(Testimony of Albert F. Metz.)

six types of cable involved here, it will vary as to each type of cable?

A. Yes. That is, the lead and copper?

Q. The lead and copper.

A. That is correct.

Q. It is not constant as to each type of cable?

A. No.

Q. That is true as to the price?

A. The price would be the same; relative quantities would be different.

Q. I should have qualified it as to each type of cable. A. Yes.

Q. It would vary as to each particular commodity, whether copper or lead, because of that?

A. The price would vary, that is correct.

Q. That is also true as to the lead and copper, in volume? A. Yes, it would vary.

Q. In each cable? A. Yes.

Q. It would also vary as to the weight of lead and copper? A. Yes. [9]

Q. And that would hold true during the entire period of the contract, as the price is changed from time to time during the period of this contract, which is April, 1946, through March, 1947—the price varied from time to time of copper and lead?

A. That is correct.

Q. So that the cost of copper and lead as to the six particular types of cable would vary as the change took place?

A. Each would change relatively as to the increase in price of copper and lead.

(Testimony of Albert F. Metz.)

Q. The weight would remain the same?

A. Yes.

Q. As a matter of fact, that was the total cost of copper and lead for the cable to be furnished under item VI? Are you familiar with that type of cable?

A. As I hear it mentioned. I don't remember the sequence of the items.

Mr. Jarvis: I have a copy of the contract.

Mr. Prince: I left with the court, with my memorandum, a copy of the contract which was made up for me. I don't have an official copy of it.

Mr. Jarvis: If agreeable, it may be offered in evidence at this time?

Mr. Prince: Certainly. [10]

Mr. Jarvis: Subject to any corrections shown to be necessary.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Jarvis): Referring to the contract, Mr. Metz, and the type of cable to be furnished under item VI—have you that in mind?

A. Yes, I see where it is.

Q. Isn't it a fact that the total cost of material there would be less than 50 per cent of the total cost of cable as of April, 1946?

A. I could not tell very well. That is quite a computation. I could not do it in my head. I can

(Testimony of Albert F. Metz.)

probably give you some idea if I see some figures I have in my papers.

Q. If you wish to refer to them.

A. The cost of copper and lead alone on that item would be very close to 50 per cent.

Q. Probably about 42 per cent? Would that be about right?

A. I have to go back for the total price, \$31,900. The total price of copper and lead, \$13,800.

Q. You are using April, 1946?

A. That's right. The April prices, roughly 43 per [11] cent for copper and lead.

Q. How much for paper and oil?

A. I don't happen to have the figures to calculate that with. I should judge it would be vary close to 7 per cent; the difference between 43 and 50 per cent.

Q. Can you give us the same figures on item VII of the contract?

A. That is about \$9000 worth of copper and lead against \$23,400 total for the billing price.

Q. We are agreed on that item, that 29.2 per cent for the total cost of 100 feet of cable would be on account of lead.

Mr. Prince: You are now relating this cost of lead and copper to the contract price?

Mr. Jarvis: Yes, and for the material distribution based on cost of the cable.

Mr. Prince: The cost of copper and lead did not relate to the contract price. I understand you are now relating——

(Testimony of Albert F. Metz.)

Mr. Jarvis: To both, the relative percentage of labor and cost of material, and contract price.

Mr. Prince: I have no objection.

A. That figures out about 38 per cent for the cost of copper and lead.

Q. (By Mr. Jarvis): What percentage for copper and what percentage for lead? [12]

A. I did not go that far.

Q. Would you get 29.2 per cent for lead and 6 per cent for copper?

A. I would have to work it out. About 32 per cent for lead and about 6 per cent for copper.

Q. About 7½ per cent for paper and oil?

A. That could vary. I am really not in a position to give anything on paper and oil. I have no figures.

Mr. Prince: I will accept what figures you have with respect to the matter, unless you want to do it on cross-examination.

The Witness: I do have something on the total.

Mr. Jarvis: I do want to talk about the particular items, and I do have some figures which have been prepared.

Mr. Prince: If I understand, you are basing the cost of lead and copper on what the City paid for the cable. Our question was regarding material, labor, overhead, and everything else—what was the cost of lead compared with other material?

Mr. Jarvis: This will show.

Mr. Prince: I have no objection.

(Testimony of Albert F. Metz.)

The Court: Overruled.

Mr. Jarvis: I would like to ask Mr. Prince if he would check this to his satisfaction. There is a lot of computation back of this. For the sake of saving time, I might offer [13] this in evidence.

Mr. Prince: That will be perfectly satisfactory. It will take a little time, and it may go in subject to correction.

The Court: That may be received as Defendant's Exhibit—

The Clerk: Exhibit B in evidence.

The Court: And may be marked in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Jarvis: This is also shown in the form of a chart that has been prepared, and we would like to offer that in the same manner, subject to correction.

The Court: It may be received.

The Clerk: That is Defendant's Exhibit C in evidence.

(The chart referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Jarvis: As to the varying sizes of cable, Mr. Metz, showing the weight of the cable, the lead sheath, and the insulation and strands—are you familiar with this chart, showing items VI and VII thereof? That figure III on the diagram illustrates the type of cable in both items VI and VII.

(Testimony of Albert F. Metz.)

A. The only information I have generally available here is to check the size of the conductor. [14]

Mr. Jarvis: If agreeable to counsel, we will make the same offer.

Mr. Prince: I have no objection.

Mr. Jarvis: This illustrates the type of cable. We will offer the two as one exhibit, as determining the relative proportion of copper and lead and other material in making up the six types shown in the contract.

Mr. Prince: No objection.

The Court: Admitted.

The Clerk: Defendant's Exhibit D in evidence.

(The chart referred to was received in evidence and marked Defendant's Exhibit D.)

Mr. Jarvis: Corresponding with the last exhibit, we do have samples of the cable, furnished by the defendant to the plaintiff. Two of these are samples of the cable furnished, and the others are similar types of cable. I think counsel has seen these.

Mr. Prince: I have seen those.

Mr. Jarvis: They were actually manufactured under the same specifications as now before the court, but by a different manufacturer. I offer them as next in order.

The Clerk: Are these received?

The Court: Yes.

The Clerk: Defendant's E in evidence. [15]

(The cable referred to was received in evidence and marked Defendant's Exhibit E.)

(Testimony of Albert F. Metz.)

Mr. Jarvis: No. 1 is a sample of the cable furnished by plaintiff of item VII under this contract.

The Witness: I think this would be 2/0; that would be 2/0.

Mr. Prince: I don't think it makes any particular difference. They are a sample of the six types before the court.

The Court: All right.

Mr. Jarvis: The one which is received as the sample of the cable No. VI should be No. VII, and the sample furnished by the plaintiff under the item No. VI is the one which we now offer.

The Witness: That is correct.

The Court: It may be received.

The Clerk: Defendant's Exhibit F in evidence.

(The cable referred to was received and marked Defendant's Exhibit F in evidence.)

Mr. Jarvis: And as the sample of the cable furnished under item No. X, under the same specification, but I believe manufactured by another company——

The Witness: That looks like the right size.

The Court: It may be received.

The Clerk: Defendant's Exhibit G in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit G.)

Q. (By Mr. Jarvis): I show you this, Mr. Metz, and ask you if that appears to be item XIV.

A. I would say so, to the naked eye.

(Testimony of Albert F. Metz.)

Mr. Jarvis: I offer this in evidence, your Honor, as next in number.

The Clerk: Defendant's Exhibit H in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit H.)

The Court: What is that solid matter in the center?

A. That is paper and insulation.

Q. (By Mr. Jarvis): I will ask you if this appears to be a sample of the cable furnished under item XV?

A. It appears to be.

The Court: It may be received.

The Clerk: Defendant's Exhibit I in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit I.)

Mr. Jarvis: I will ask if this appears to be a sample of the cable furnished under item XVI.

A. That appears to be.

Mr. Jarvis: I offer this next in order.

The Clerk: Defendant's Exhibit J in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit J.)

Q. (By Mr. Jarvis): In all of these exhibits, the copper shows up as copper-colored, and the lead shows up as black, and the composition of the other materials——

A. It is paper on both, manila and pulp; the paper is impregnated with oil. The paper is used as a means for holding the oil. That is wrapped

(Testimony of Albert F. Metz.)

around the copper, and that builds a wall, to take care of the voltage in the specification.

Q. In the Department, Bureau of Labor Statistics, index of wholesale prices, metals and metal products, there is no commodity such as oil or paper.

A. I don't recall either of those items.

Q. So, as a matter of fact, when you state that 90 per cent of the cost of materials in the making of these cables is on account of lead and copper, that is subject to qualification as to which cable?

A. I was thinking of the combination.

Q. But as to each type of cable that varies?

A. Yes.

Q. From whom did you purchase the lead and copper that went into the cable?

A. I couldn't say which particular source this came from. It goes into our stock, and goes out.

Q. Was copper and lead on hand?

A. No, not for the cable.

Q. But you had stock on hand?

A. We were not allowed to have stock on hand.

Q. You had some on hand?

A. For production, according to schedule.

Q. During what month did you acquire lead and copper used in the manufacture of the cable?

A. It was acquired during the life of the delivery.

Q. Can you give us the delivery date?

A. Approximately October, 1946, and March, 1947.

(Testimony of Albert F. Metz.)

Q. You did not acquire any copper used in the manufacture of cable during October, 1946?

A. Yes, indeed. I should not have said during the period of shipment; I should have said manufacture.

Q. This \$24,000 figure is your estimate of the increased cost of both copper and lead during the period of manufacture, the contract period over and above what it was in April, 1946?

A. That is correct.

Q. In computing the matter of increase in labor cost, Mr. Metz, did you have a copy with you of the United States Department of Labor Index for that purpose?

A. I have only the 1946 summary.

Q. Does that show the table for—— [19]

A. I have only got my own memorandum about what that index was for the months of April and March.

Q. That is shown in the claim filed?

A. Yes.

Mr. Prince: There is not any controversy, if you want to show that.

Mr. Jarvis: I am showing you now a copy of the claim which you filed.

A. That is correct.

Q. In one of the schedules it shows the index which you use in computing the labor cost?

A. Yes.

Q. That is, in column 2 it shows the labor index?

(Testimony of Albert F. Metz.)

A. Yes.

Mr. Jarvis: We offer that next in evidence.

Mr. Prince: No objection.

The Clerk: Is it admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit K in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit K.)

Q. (By Mr. Jarvis): Are you familiar with the mimeographed releases of the United States Department of Labor, hourly earnings for the month of April, 1946? A. Yes. [20]

Q. Table 2? A. Yes.

Q. You are familiar with the contract for the hourly wage, in the specification in the index for electrical equipment? A. Yes.

Q. What was it for the month of April?

A. 24.9—April, 1946, was 110.4.

Q. That was the figure that was used?

A. I imagine that it must be.

Q. It refers to schedule 2 of the claim?

A. Yes, that's right.

Mr. Jarvis: We offer this in evidence as defendant's next in order.

Mr. Prince: That, of course, if your Honor please, appears to be the table without dispute that was referred to the labor adjustment. I don't see the materiality. I don't want to object. I think it is adding to the record. We are both in agreement as to the labor increase.

(Testimony of Albert F. Metz.)

The Court: The objection will be overruled.

The Clerk: Defendant's Exhibit L in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit L.)

Mr. Jarvis: There are seven of these, beginning the month of April through the month of May, 1947. [21]

The Court: Why don't you offer it as a sample? You are making a very voluminous record. You need only one to illustrate it.

Mr. Jarvis: That is quite agreeable if counsel would agree that the others would show the figure on the labor index on Defendant's Exhibit K, Schedule 2.

Mr. Prince: That is satisfactory.

Mr. Jarvis: If the court please, that concludes our cross-examination of Mr. Metz except on one point, on which we would like to have the privilege of recalling him.

The Court: And redirect?

Mr. Prince: No redirect examination.

The Court: Step down.

Mr. Prince: If the court please, I think the only other thing I want to put in evidence is out of Mr. Jarvis' files. I have seen it before. It is simply a certified copy from the Bureau of Labor, of the price index—the three monthly reports. I think they might be offered in evidence as one exhibit.

Mr. Jarvis: The materiality of some of these

(Testimony of Albert F. Metz.)

we make objection to. We object to the introduction of all those proposed, and certified by the Department of Labor, with the exception of the Table, on pages 11 and 12 of Bulletin 920, Department of Labor, and with the exception of three monthly releases, January, February and March, 1947—the last [22] page of each release. Those matters, we feel, are material to this case.

The Court: Objection overruled.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

The Court: They are not objecting to the lack of foundation. They are objecting to materiality. I am allowing all this material to go in, and I will determine later on as to effect to give it.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Prince: Nothing further on the part of the plaintiff.

(Whereupon an adjournment was taken until 2:00 o'clock p.m. of the same date.) [23]

Los Angeles, California;

February 23, 1949; 2:00 o'Clock P.M.

Mr. Jarvis: If the court please, plaintiffs have during the noon recess gone over defendant's Exhibit No. B, and have pointed out to us where Table IV, on page 2, refers to the monthly review, and we would ask leave to strike the words

“monthly labor review,” and the statement would then read “Bureau of Labor Statistics for April of 1946,” if that is agreeable.

Mr. Prince: That is agreeable, your Honor.

ALBERT F. METZ

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Cross-Examination

By Mr. Jarvis:

Q. Mr. Metz, if you can, state briefly to the court the result of your checking the exhibit as to quantities of lead and copper in the manufacture of cable by type, value, weight, and so forth.

A. On Exhibit B, I would like to call your attention to Tables I, II, III and IV, and I would like to say something about the weights used. In the manufacture of cable, where we have to make cable, rather rigid allowances have to be made for tolerance, in order to come out with your cable acceptable to the inspector.

Q. In the manufacture you want to be sure that you meet the requirements? A. Yes.

Q. These tables were prepared from particular weights which would not correspond exactly with the manufactured cable?

A. Yes. That is the contract price, and this is the cost of lead and oil. On Table IV it would be well to state that the total is 50 per cent of the contract price.

(Testimony of Albert F. Metz.)

Q. It is agreeable to us if you will mark the exhibit.

A. I think it will be well to state that.

Mr. Jarvis: The witness is writing with pencil the words "contract price," and on Table IV the witness is writing "50 per cent of contract price."

A. Yes. There are three sheets to this Exhibit B. According to our estimate, the total figure was \$108,130.

Q. There, too, the weights which you actually used were over the amounts stated in the table as theoretical weights? A. That is correct.

Q. Your total of copper and lead used in connection with this cable was how much?

A. \$40,310.81.

Q. The cost, then—Did I understand you, the plaintiff [25] entered into the contract dated April 1946, and the cost of the copper and lead, based upon the amount actually used, in that connection was about \$16,000? In other words, \$24,000—

A. \$24,000, in addition to the \$40,310.81. These figures were the figures we estimated for the April cost; according to our figures, \$38,078.

Q. The only difference in your table was using theoretical weight? A. Yes.

Q. As against the actual amount of copper and lead? A. That is correct.

Q. Is there any comment you wish to make?

A. In Exhibit C, I ought to make a check as to the weights. We would say the same remarks here

(Testimony of Albert F. Metz.)

as to the weights. In Exhibit C, a graph of costs, would indicate what I said before this morning, that about 90 per cent of the cost of material is in copper and lead.

Q. With regard to the cable in item VI, this shows 51 or 52 per cent——

A. Of the total contract price.

Q. Of the total contract price for that item was made up of other costs than material?

A. Yes.

Q. About 52 per cent of the total contract price was [26] made up of costs other than of material?

A. That's right.

Q. As to item X, about 20 per cent was made up of costs other than materials?

A. That is right.

Q. The other item—XIV?

A. About 48 per cent of other costs.

Q. Item XV, about half of 50 per cent was made up in other costs? A. Yes.

Q. As to item XVI, about 57 per cent was made up of other costs? A. Yes.

Q. Do you have any other comments as to the exhibits and bulletin, showing the costs?

A. I have no other comment.

Q. With those comments, the table, the calculations, the chart, are accepted as being accurate?

A. They seem to be. On examination of Exhibit D, I just noticed the drawings were approved by Mr. Bolser and Mr. Jenkins, and any drawings by them are good enough for us.

(Testimony of Albert F. Metz.)

Q. Mr. Bolser and Mr. Jenkins are electrical engineers in charge of underground installation?

A. Yes, and very capable men. [27]

Q. I show you what appear to be invoices of The Okonite-Callender Cable Co., dated December 23, 1946, December 31, 1946, February 11, 1947—two of them—and April 16, 1947, and ask you if you are familiar with those. A. Yes.

Q. You recognize those as being invoices of your company? A. Yes.

Q. Those were sent to the Department of Water and Power by your company? A. Yes.

Q. And the invoices were paid by the Department of Water and Power to your company?

A. Yes.

Mr. Jarvis: We offer those in evidence as defendant's exhibit next in order.

Mr. Prince: I want to make the same objection. I want to object to the introduction on two different and independent grounds: 1, that the defendant has taken the position that the contracts are clear and unambiguous. There are cases in the Federal courts where the contracts are clear and unambiguous, holding such evidence not admissible; on the second ground, that they are not admissible under both the Federal and Ninth Circuit cases, unless the authority of the person sending them has been proved. They are not admissible or at least subject to a motion to strike if not connected.

(Argument.)

(Testimony of Albert F. Metz.)

The Court: The objection will be overruled. It may be received as an exhibit.

The Clerk: That is Defendant's Exhibit M.

(The document referred to was received in evidence and marked Defendant's Exhibit M.)

Mr. Jarvis: As this is an original record of the Department, we have photostatic copies which we would like to offer in lieu of the originals and withdraw the originals.

The Court: The objections are overruled, and copies of the originals may be filed.

Q. (By Mr. Jarvis): In other words, these invoices were sent out by your company in the usual course of business? A. Yes.

Q. And were paid by the Department in the same manner? A. Yes.

Q. That is all.

Cross-Examination

By Mr. Prince:

Q. When did you first see or hear of these invoices you have just identified? A. April 1947.

Q. That was after the contract had been fully performed? [29]

A. That was after all the shipments had been made.

Q. What did you do after you learned of these particular invoices? Did you prepare or have prepared a formal invoice that covered the whole contract. That is correct.

Q. I show you an invoice dated September 29,

(Testimony of Albert F. Metz.)

1947, No. CO247, and ask you if that was prepared by you, or under your supervision, after you learned of the other invoices that have just been introduced in evidence. A. That is correct.

Q. And it indicates the supporting data of the amount we are claiming under the adjustment clause? A. Yes.

Q. When the contract was entered into, were you then familiar with the fact that it contained a provision as to an escalator clause?

Mr. Jarvis: I object to that. It is immaterial.

Mr. Prince: Withdrawn. Were you familiar that the contract provided that the time for adjustments in the contract would be deferred until completion of the contract?

Mr. Jarvis: Is this directed to Mr. Metz' knowledge individually?

Mr. Prince: It is not for the purpose of varying the terms at all. The question of adjusting the price was under Mr. Metz' jurisdiction as vice president and treasurer [30] of the company.

The Court: Go ahead.

A. Yes, I knew there was an escalation to be carried over at the end of the contract.

Q. And you had not personally known anything about the fact that this interim invoice had been given until after the completion of the contract?

A. That is correct.

Q. After that a claim was prepared and presented to the City and paid in part and rejected in part? A. That is correct.

(Testimony of Albert F. Metz.)

Mr. Prince: I think that is all.

Redirect Examination

By Mr. Jarvis:

Q. Prior to April or May 1947, you did not have any conversations with any representative of the Department of Water and Power, one of the defendants here, as to the method of billing?

A. No, I had no conversation.

Q. I believe you did, when Mr. Wilson and you came to my office? A. Yes.

Q. The exact date I don't recall. I believe it was June 1947.

A. Yes, when this was brought to my attention for [31] final billing we saw what had been done, and we arranged to meet with you and Mr. Foster.

Q. Prior to that you had no conversation?

A. No.

Q. That is all.

Recross Examination

By Mr. Prince:

Q. Mr. Metz, Mr. Jones, who signed the final contract with Mr. Wilson, died sometime in January? A. Yes.

Q. You were vice president and treasurer and the chief executive officer of the company?

A. I am today.

Q. The presidency has not been filed to date?

A. No.

The Clerk: Is this admitted?

The Court: Yes.

(Testimony of Albert F. Metz.)

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Jarvis: We have three motions to strike directed to particular portions of Mr. Metz' testimony.

The first is, the defendants move to strike the part that 90 per cent of the value of the material going into the manufacture of this cable is made up of lead and copper. [32]

The second motion——

The Court: Let us have one at a time.

Mr. Jarvis: ——on the ground that the evidence is incompetent, irrelevant and immaterial.

The Court: The motion will be denied.

Mr. Jarvis: And the second motion to strike the testimony of Mr. Metz is that the material which they actually used in the manufacture of this cable under this contract actually cost more than \$24,000 than it cost at the time they entered into the contract. In other words, during the month of April 1946, it doesn't matter to the court in interpreting the contract whether the plaintiffs made a profit or loss.

The Court: It indicates there was a substantial increase in price. It is similar to the situation that arises in a patent lawsuit; in other words, to show that the invention has been reduced to practice you may show the sale, not as an indication of damages.

(Testimony of Albert F. Metz.)

but to show it was not a proper payment. The object of having this in is to show that there was a substantial fluctuation in price, although the testimony that there was an increase, whether it was great or small, is not material. I think I will allow it to stand, to show that it was substantial.

Mr. Jarvis: The third motion to strike would be the testimony of Mr. Metz as to Code No. 472.1 being used by the Department of Labor, and the specifications did comply with [33] the specifications set out in this contract, being the same code number, and we fail to see how the use of such code number has any bearing on this case. I don't know that the matter is of much moment.

(Argument.)

The Court: Motion denied.

(Addressing Mr. Prince) Have you any additional testimony?

Mr. Prince: No, we rest.

Mr. Jarvis: At this time the defendants wish to move the court for a dismissal of the action upon the ground that the plaintiff has failed to show that they are entitled to a judgment in this action, and there is sufficient evidence before the court now upon which the court can make a final determination of this action.

The Court: The motion will be denied. I desire to determine the matter in the light of all evidence.

WILLIAM R. FOSTER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Court: State your name, please.

The Witness: William R. Foster. [34]

Direct Examination

By Mr. Jarvis:

Q. Where do you live, Mr. Foster?

A. 640 Grand Avenue, South Pasadena.

Q. By whom are you employed?

A. The Department of Water and Power, City of Los Angeles.

Q. How long have you been employed by the Department of Water and Power of the City of Los Angeles? A. A trifle over 40 years.

Q. In what capacity are you now employed?

A. Purchasing agent.

Q. How long have you been?

A. Since January 1941.

Q. You have been purchasing agent for the Department of Water and Power since January 1941? A. Yes.

Q. Continuously? A. Yes.

Q. Are you familiar with the contract in the action where the price for adjustment is to be based upon the index of wholesale prices for Group VI? A. Yes.

Q. When did you first become familiar with that clause? [35]

(Testimony of William R. Foster.)

A. I would say early in 1941.

Q. In what connection?

A. Making a study of various price adjustment clauses so that we could secure the necessary material.

Q. Did the Department use that clause for adjustment? A. Many of them.

Q. How many?

A. I have a complete file, I think.

Q. In other words, this type of adjustment clause has been used by the Department?

A. Yes.

Q. This is a record you had made under your supervision and control? A. Yes.

Q. What does that show?

Mr. Prince: I want to object to it as incompetent, irrelevant and immaterial. Briefly, we are trying this contract and this clause; not some other contract.

The Court: To what is this testimony directed?

Mr. Jarvis: To show the extent it was used, not only by the Department, but by other companies.

The Court: I can't see how the widespread use of the clause is material.

Mr. Jarvis: Only, if we can show it was widespread, the plaintiff might have known of it.

The Court: The fact that they accepted it is the important part; not whether they knew of it or not.

The objection will be sustained. I will allow Mr.

(Testimony of William R. Foster.)

Foster to state what he communicated to the representatives of the plaintiff with regard to this clause, if there was any discussion on it.

Q. (By Mr. Jarvis): Will you, as the court has suggested, tell what conversations you had with any representative of the plaintiff, where it took place, and what was done and said, in substance.

Mr. Prince: And the time.

Mr. Jarvis: Yes.

A. The time I can't tie down to any exact date, but it was March, 1946. We had two contracts at the time.

Q. What was the other? A. Cable.

Q. Do you know the number?

A. 9266. There were three contracts awarded under it.

Q. What were they?

A. 9266A, the contract of the Okonite Cable Company, Inc.; 9266B, the General Electric Company, and 9266C, the General Cable Corporation.

Q. What was the date of those contracts?

A. The date of the contracts was May 1946.

Q. The same date as this contract? [37]

A. Yes. However, the advertisement was not posted that same date.

Q. The advertisement in 9317 was what?

A. May 29th.

Q. Bids to be returned what date?

A. April 11th.

(Testimony of William R. Foster.)

Q. The bids were received, were opened, and award made to the three companies you have mentioned for the different items in the specifications?

A. Yes.

Q. The other two companies receiving other items under the specifications? A. Yes.

Q. When did you have any conversation with the representative of The Okonite Company?

A. Prior to the advertisement in the month of March. I prepared a rough draft from a contract, which I hoped would cover it.

Q. What was the nature of that?

A. I prepared a rough draft, and discussed it with representatives of the various firms, including Okonite, and the one which was allowed, I think, in this case was given to the representative and he was to give his reply as to whether they would go along with that contract—the one with the adjustment clause. A reply was received—the last one was [38] received March 29th.

Q. So your conversation was prior to that?

A. Yes.

Q. What was your reason for considering the price adjustment clause at that time?

A. Because it was impossible to buy material of any one on a firm price basis.

Q. Did you use this adjustment clause to purchase material? A. Yes.

Q. During the period from 1941 to 1946?

A. Yes. It was from 1941 to 1948; not 1946.

(Testimony of William R. Foster.)

Q. Who was the representative of the Okonite people? A. Ted Kennedy.

Q. As I understand you, you cannot fix the time exactly? A. No.

Q. In substance, the conversation was just as you have said? A. Correct.

Q. That is, they would be agreeable to this form of price adjustment clause? A. Correct.

Q. Was anything said by you or Mr. Kennedy subsequent to May 21st? [39]

A. No. There was nothing further discussed.

Q. Did Mr. Kennedy report back to you concerning his company's attitude toward the clause?

A. Yes, and they agreed to give us a quotation, and did.

Q. Prior to that, that will be prior to March, 1946, you received this information from Mr. Kennedy? A. Yes.

Q. That is all.

Cross-Examination

By Mr. Prince:

Q. As I understand your testimony, you prepared this price adjustment clause, which you say was identical with this, and gave a copy to Mr. Kennedy?

A. No. Just a rough draft.

Q. Was there any discussion with Mr. Kennedy that they would want the contract for lead and copper?

A. No. He had a copy of a book on my desk. I

(Testimony of William R. Foster.)

don't remember whether it was the latest statistics. I looked it over. It was a general discussion.

Q. And in 1948 you discontinued this clause?

A. No; we haven't discontinued it yet.

Q. Didn't your new contracts differ entirely?

A. The last one had the identical clause. That was December 1948. [40]

Redirect Examination

By Mr. Jarvis:

Q. What other type of material was purchased under this price adjustment clause?

A. We have seamless carbon molybdenum pipe, oil circuit breakers, metal enclosed switchgear, cast steel valves and—I am skipping about—lead covered cable, heat exchangers and steam turbine electric generators, and other items.

Q. This price adjustment clause was used generally in all contracts during this period?

A. All contracts of this nature; not all contracts.

Q. All contracts of the nature of the items you specified. A. Yes.

Q. What was the reason for that?

A. That clause was worked up primarily in the hopes that we would not have too many adjustment clauses, and we could use one adjustment for the material. It was picked because that group was used in a lot of materials and equipment that we purchased. It was thought it would save the necessity of having different types of adjustment. We

(Testimony of William R. Foster.)

changed our own adjustments. We changed first in the latter part of 1946. We renewed what we called the OPA price adjustment clause base in the Office of Price Administration.

Q. Did that have reference to the price index of the [41] Department of Labor?

A. I don't remember all the details.

Q. I don't care to go into any more detail than necessary. I want to show you did, however, change the clause.

Recross-Examination

By Mr. Prince:

Q. How did you come to put in the escalator clause?

A. There were two reasons. The first one was, to be able to do business, and, second, the adjustment clause was a protection to the parties.

Q. You were trying to work out a fair clause for the protection of both parties?

A. Yes. The main thing, if prices went down we wanted it.

The Court: You were buying a great variety of products? A. Yes.

The Court: All sorts of electrical supplies?

A. Yes.

The Court: You were not interested so much in the general uptrend of prices as in the trend in things you wanted?

A. That is correct.

The Court: If the price of groceries had gone up

(Testimony of William R. Foster.)

100 per cent, you didn't care; you were interested in the price of electrical products?

A. The adjustment clause was to favor those particular [42] commodities,

Redirect Examination

By Mr. Jarvis:

Q. Why did you choose for the metal products Group VI?

A. For the purpose of reducing to the lowest possible minimum the price adjustment clause we would have to use. There are a great many in that group, and we thought, to take a group of that kind, it would reduce a considerable number of price adjustment clauses, which we would have to have.

Q. What length of delivery periods would these contracts cover?

A. Anywhere from six months to two years, or more.

Q. Did you have in mind that the component figure for many groups was a more conservative figure on which to adjust the price? A. Yes.

Q. Rather than the individual commodity?

A. Yes.

(Short recess.)

CLYDE ERRETT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

(Testimony of Clyde Errett.)

The Witness: Clyde Errett. [43]

Direct Examination

By Mr. Jarvis:

Q. Where do you live?

A. 428 South Holt Avenue, Los Angeles.

Q. What is your business or occupation?

A. I am comptroller and chief accountant, employed by the Department of Water and Power.

Q. How long have you been so occupied?

A. I have been in this particular position about ten and a half years; altogether in the Department about 29 years.

Q. I show you a compilation of figures, and ask you if you will please tell the court what that is.

A. This is a tabulation of invoices received from The Okonite-Callender Cable Company for the price adjustment between December 23, 1946 and April 16, 1947.

Mr. Jarvis: That is a tabulation of the invoices which have been received in evidence as Plaintiff's Exhibit 2—I am sorry; I picked up the wrong one. I should have said Defendant's Exhibit M. What you have is the tabulation of those invoices and the amounts and dates? A. Yes.

Mr. Jarvis: We will offer them in evidence as a part of Defendant's Exhibit M. We think they may be of some help in considering the invoices and the amounts and dates. [44]

Mr. Prince: I assume my objection that your Honor overruled will apply to these?

(Testimony of Clyde Errett.)

The Court: Yes.

Q. (By Mr. Jarvis): On these invoices it shows the dates of payment; that they were paid prior to the completion of the contract; that is, prior to March 24, 1947. Would you tell the court why they were paid prior to that time?

A. Each of these invoices has a 10 per cent discount if paid before 10 days. It was in order to take advantage of that that they were paid prior to that date.

Q. And the bills were paid prior to that date?

A. Yes.

Q. You heard Mr. Foster's testimony of the escalator price adjustment clause. Can you tell the court if the price adjustment concurs with other types of contracts?

Mr. Prince: I object to that is incompetent, irrelevant and immaterial.

The Court: I will allow it to the extent that this man communicated it to a representative of the Department. If not, I can't see any materiality at all.

Q. (By Mr. Jarvis): Have you talked to any of the representatives of The Okonite Company prior to the time you talked to Mr. Kennedy and Mr. Borda, I believe, in my office in the summer or early fall of 1947?

A. No, I did not. [45]

Q. As to the manner of payment of other contracts which contain the same adjustment clause, can you tell the manner of that payment?

(Testimony of Clyde Errett.)

Mr. Prince: I presume—

The Court: I will sustain the objection.

Cross-Examination

By Mr. Prince:

Q. You said you paid them to take advantage of the 10 per cent deduction. You were aware that that adjustment under the escalator or price adjustment clause was to be deferred until after the contract was completed?

A. No sir. If I may correct that: It was $\frac{1}{2}$ of 1 per cent.

Redirect Examination

By Mr. Jarvis:

Q. I should have asked the manner in which the Department computed the escalation of the contract price of 20 per cent of the increase in labor cost. I show you Defendant's Exhibit L, which is the Bureau of Labor Statistics of average hourly earnings as shown in Table 2, page 7, and ask you if you will tell the court the manner in which the price adjustment was computed.

A. That was based on the average figures for the average period.

Q. That computation was made using the index figure [46] for the average hourly earnings?

A. That is correct.

Q. It shows an index figure for the month of April, and figures for each succeeding month?

A. For the period of the contract, or the average of the period involved.

Q. You are referring to the average of the index figure from April to October?

(Testimony of Clyde Errett.)

A. If that was the period.

Q. And the other period of time, using the average from April to January 1947? A. Yes.

Q. And the other being April 1946 through March 1947?

A. That is right.

Q. In other words, the same manner of computation of adjustment of labor as used by The Okonite Company?

A. That is correct.

Recross-Examination

By Mr. Prince:

Q. That is the smallest subdivision of labor figures under that group of electrical products? In other words, you took your electrical equipment and the wages?

A. That is correct. But I don't understand what you mean by the smallest group.

Q. It is one of the smallest groups under electrical [47] matter—electrical equipment, radio and phonographs, and communication equipment? There is no other subdivision?

A. No, sir. Those are the three items.

Q. That is all.

BORIS A. GRAY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

(Testimony of Boris A. Gray.)

A. Boris A. Gray.

Direct Examination

By Mr. Jarvis:

Q. Mr. Gray, you are employed by the Department of Water and Power? A. Yes.

Q. In what capacity?

A. I am electrical engineer in the underground engineering section.

Q. You work directly under Mr. Jenkins?

A. Yes.

Q. You prepared the table shown in Defendant's Exhibit B?

A. Yes, I did.

Q. You also prepared the chart shown on Defendant's Exhibit C? A. Yes. [48]

Q. The testimony of Mr. Metz this morning was that about 90 per cent of the cost of materials was comprised of lead and copper. Is that true for each particular type of cable? A. No.

Q. Can you give the variations as to each type of cable?

A. I prepared an additional table as to lead and copper. Item VI, 84.67 per cent; Item VII, 82.31 per cent; Item X, 97.10 per cent.

In all other items it runs above 90 per cent.

Q. You might give the figures for Items XIV, XV and XVI.

A. Item XIV, 93.16; Item XV, 91.01; and Item XVI, 91.99. The average of all would be 91.33.

Q. That varies with each type of cable, between

(Testimony of Boris A. Gray.)

82.31 per cent of copper and as high as 97.10 per cent?
A. That is correct.

Q. Referring to the chart or diagram, can you compare the per cent of copper as to lead?

A. Well, the percentage of cost of copper as to lead varies with the different items. For example, Item VI, lead, it is $1\frac{1}{2}$ for copper; Item VII, it would be about five times [49] costlier; for Item X it would be about two-thirds; Item XV, it is about $2\frac{1}{2}$ over, and Item XVI, it is about 3 to 1. So the percentage of lead and copper varies all over the scale in accordance with the type of cable these materials are used in.

Q. Do you find in copper and lead any basis on which the lead and copper are a 50-50 basis?

A. I couldn't say as to lead and copper. There may be an occasional instance in which lead and copper could be used in the same proportion, but neither by volume or weight.

Q. Your testimony would be the same with respect to the different averages of the cable that was advertised and awarded to other companies?

A. That is correct.

Q. Do you agree with Mr. Metz' statement on the stand before this court?

A. Mr. Metz might be right, but in the actual manufacture of cable the tolerances are permitted, either up or down. It depends on the particular use of the cable, as to the lead and copper.

Q. In any particular cable you make up, that tolerance may be both ways?

(Testimony of Boris A. Gray.)

A. Tolerances are both ways.

Mr. Prince: I have no questions, your Honor.

The Court: The figures you were reading from were prepared [50] from this table which you have numbered V, is that correct?

A. That is correct.

Mr. Jarvis: We offer that in evidence, as to the percentage of cost.

The Witness: May I add that these figures are based on the figures on this, in the same relation. (Referring to Exhibits C and N.)

Mr. Prince: As I understand, there are instances in accordance with what Mr. Metz testified, that it might be within 90 per cent in a particular piece of cable? A. Yes, but not in all of them.

The Clerk: This is Defendant's Exhibit N.

(The document referred to was received in evidence and marked Defendant's Exhibit N.)

Mr. Jarvis: We have here a copy of the United States Department of Labor, Bureau of Labor Statistics, the monthly Labor Review, Vol. 62—No. 6, for the month of June 1946, which is the monthly publication of the Department of Labor, and it is on the terminology of the contract and contains, on page 974, a table or index of the wholesale group of commodities in April 1946, compared with the previous months, the previous months being March 1946, April 1945 and August 1939.

It contains two indexes: Wholesale prices by groups of commodities for several years, showing the index figures for [51] all commodities, and they

(Testimony of Boris A. Gray.)

fall into ten groups, one of which is Metals and Metal Products.

We will offer at this time the two tables to the court for the purpose of showing the same figures as shown in another publication of the Department of Labor. We are only offering the two tables.

(Discussion.)

The Court: The objection will be sustained. It has no standing in court. It is merely a reprint of the official statistics, and a mimeographed copy has already been introduced.

Mr. Jarvis: That completes our case.

Mr. Prince: We rest.

(Whereupon court was adjourned.) [52]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of August, A.D., 1949.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed Aug. 23, 1949. [53]

Trial resumed pursuant to adjournment.

The Court: Gentlemen, when we have a respite new thoughts sometimes occur to counsel and they sometimes occur to the court, so before we proceed, I am going to ask if, notwithstanding the fact that both sides have rested, in the matter of an after-thought you have thought of some additional matters you desire to put into the record?

Mr. Prince: Not from our point of view, your Honor.

The Court: One thought has occurred to me, gentlemen, in studying the exhibits between adjournment time and now, that in the interests of a complete record and because of the wording of this clause in the contract, the price adjustment clause, and because I have adopted a liberal rule in allowing the introduction of matters that bear upon the interpretation, and subdivision 2. b. of this clause is rather general in identifying the compilation, that I should change my ruling and allow the issue of the Labor Review containing the data which was offered yesterday to go in. I am still of the view that I was of yesterday, that they do not have the sanction of the statistics which are given separately, which are compiled and distributed separately every month, but, in view of [3*] the fact that there may be a difference in the content of these, I believe they should all be before men and, if objection is made upon the ground of proper authentication, I am inclined to change my ruling and allow it to go in.

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

Then we will discuss the effect to be given to one or the other.

Mr. Prince: That is entirely satisfactory, your Honor. I think that I might suggest this, in view of that particular admission of that, this is simply a later edition, your Honor, a 1948 edition of the same publication. They have apparently changed the size of it, but it is the identical publication. This on page 155 is what I read from yesterday, which explains the official figures. I think that your Honor should have this before you, also.

The Court: Well, if he insists on getting it in, we will have both of them.

Mr. Prince: Yes. I thought we ought to have both of them.

The Court: Did you identify that yesterday?

Mr. Jarvis: I did, for the record, but I am in the unfortunate position of not now having the pamphlet with me. I had 10 or 12 yesterday, but the weight was such that I left them in the office this morning.

Mr. Prince: The table, your Honor, is in this one, and I have a different number. The other articles of content, [4] this table D-9 is the same.

Mr. Jarvis: As Mr. Prince says, it is the same publication, only of a different size. However, it is of a later date and doesn't contain the particular table or index figure applicable for the period of the contract.

The Court: Can't you call up someone in your Department to send it over?

Mr. Jarvis: Yes.

The Court: Your office is only a stone's throw from here. It will only take a short time.

Mr. Jarvis: Surely.

Mr. Prince: Of course, you would probably have to put in 12 of them to cover the whole period, which seem to me isn't of importance. Either one of them is enough to put in.

Mr. Jarvis: The thought occurred to me that we could do the same as we did on the yearly wage index, put in one as an example.

The Court: As an example. All right, we will give it a number now, and you supply it. Give it a number now.

The Clerk: That will be Defendants' Exhibit O in evidence.

Mr. Prince: And could this one follow then, this other [5] one?

The Court: Then, you will supply that to the Clerk?

Mr. Jarvis: Yes; we will.

The Court: Then you will have it brought here?

Mr. Jarvis: Yes.

The Court: And it will be only the pages relating to these statistics.

Mr. Jarvis: Yes. Tables 1 and 2.

Mr. Prince: The only page I am interested in is this technical explanation of the wholesale price indices which appears on page 155.

The Court: All right, we will receive that in evidence as the next plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit No. 3.

The Court: As Plaintiff's Exhibit 3. All right.

(Page 155 of the publication Monthly Labor Review of August, 1948, Vol. 67, No. 2, so offered and received in evidence, was marked as Plaintiff's Exhibit 3.)

Mr. Prince: May I proceed, your Honor?

The Court: That completes the record. And you will supply that document?

Mr. Jarvis: Yes, I will.

The Court: All right.

(Argument on behalf of Plaintiff, by Mr. Prince.) [6]

The Court: All right, Mr. Jarvis.

Mr. Jarvis: Counsel and if the court please, the Monthly Labor Review has been handed to the Clerk, a copy of it.

The Court: Yes. It has been marked Defendants' Exhibit O.

(Said copy of publication Monthly Labor Review, Vol. 62, No. 6, June, 1946, and specifically page 974 thereof, were marked as Defendants' Exhibit O in evidence.)

Mr. Jarvis: By referring to that, the Court can see very readily how we reach the 6th group. By counting down from the top on the lefthand page, you come to the 6th group, and a Roman numeral is used but it does not appear in the pamphlet itself.

The Court: You are eliminating the first one, "All commodities." Otherwise, it would be the 7th.

Mr. Jarvis: Well, "All commodities" means the composite figure for the entire index.

The Court: Yes.

Mr. Jarvis: And then all commodities are divided into the 10 groups of which Metals and metal products constitute the 6th group.

The Court: Well, this is that subdivision of a separate table. [7]

(Argument on behalf of Defendants, by Mr. Jarvis.)

(Closing argument by Mr. Prince on behalf of Plaintiff.)

The Court: All right, Gentlemen, the matter will stand submitted. I thank you for the swiftness with which you presented it. I will determine it within the next few days. [8]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of July, A.D., 1949.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed Aug. 22, 1949.

[Endorsed]: No. 12337. United States Court of Appeals for the Ninth Circuit. Department of Water and Power of the City of Los Angeles, et al., Appellants. vs. The Okonite-Callender Cable Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 25, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12337

THE OKONITE-CALLENDER CABLE COM-
PANY, INCORPORATED

Plaintiff and Appellee.

vs.

DEPARTMENT OF WATER AND POWER OF
THE CITY OF LOS ANGELES; THE CITY
OF LOS ANGELES, a Municipal Corporation
Defendants and Appellants.

- I. STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY;
- II. DESIGNATION OF RECORD MATERIAL
TO CONSIDERATION OF APPEAL
(RULE 19, USCA—9)

I.

Statement of Points on Which Appellants Intend
to Rely

The statement of the points on which the Depart-
ment of Water and Power and the City of Los
Angeles, appellants in the above-entitled action, in-
tend to rely on their appeal herein is as follows:

1. The trial court erred in overruling the ap-
pellants' objections to the appellee's introduction
of the following evidence:

(a) That at the time of appellee's bid, and at
the time the bid was accepted, and at the time of

entering into the contract, there was an extreme shortage of lead and copper.

(b) That appellee did not have on hand at the time of the bid, at the time the bid was accepted, or at the time the contract was entered into, sufficient lead and copper, or either of them, to manufacture the cable to be furnished under the contract.

(c) That at the time of the bid, its acceptance and the execution of the contract, and for a number of months thereafter, the purchase and use of lead and copper by manufacturers were controlled by the United States Government, and appellee was able to purchase from time to time only sufficient amounts of lead and copper to meet current manufacturing requirements and deliveries under the contract.

(d) That appellee used reasonable diligence, and, subject to Government regulations, purchased from time to time the amount of lead and copper required in the manufacture of cable.

(e) That in so purchasing lead and copper, the appellee was required to pay and did pay for lead and copper about \$24,000 in excess of the market price of lead and copper in the month of April, 1946.

(f) That the excess actual cost of lead and copper in the sum of \$24,000 is more than the amount sought to be recovered by appellee, plus payments made by the appellants, on account of the Price Adjustment Clause.

(g) That the cost of lead and copper used in the manufacture of all of the items of cable, as a group, amounted to slightly in excess of ninety per cent of the total cost of all material used in the manufacture of cable to be furnished under the contract.

(h) That the contract specifications controlling the quality and type of copper and lead to be used in the cable are identical with the quality and type of copper bearing United States Department of Labor Commodity No. 472.1 (Copper, electrolytic, delivered Connecticut Valley), and lead bearing United States Department of Labor Commodity No. 473 (Lead, pig, desilverized, f.o.b. New York).

(i) In permitting the introduction of all of the United States Department of Labor Bulletin No. 920, "Wholesale Prices, 1946," Tables 1 and 2 of said bulletin, instead of only Tables 1 and 2 on pages 11, 12 and 13.

(j) In permitting the introduction of all of the United States Department of Labor Bulletin No. 920, "Wholesale Prices, 1946," Tables 1 and 2 of said bulletin, instead of only Tables 1 and 2 on pages 11, 12 and 13, and Table 12 on pages 38 to 137.

2. The Court erred in denying appellants' motion to strike the testimony of appellee's witness that the cost of copper and lead constituted ninety per cent of the cost of all materials used in the manufacture of cable; that appellee did not have sufficient copper on hand to meet the requirements of the contract in May, 1946, and had to purchase copper and lead from time to time, and that the

figures of the Bureau of Labor Statistics refer to copper as specified in the contract as Code No. 472.1, and refer to lead specified in the contract as Code No. 473.

3. The Court erred in sustaining appellee's objections to the introduction by appellants of the following evidence:

(a) That the Price Adjustment Clause in question had been used extensively by the Department and by other companies;

(b) Whether the Price Adjustment Clause concurred with other types of contracts and the manner of payment of other types of contracts containing the same price adjustment clause.

4. The evidence is insufficient to support the Findings of Fact in the following particulars:

(a) The index of wholesale prices compiled monthly by the United States Department of Labor referred to in the contract "was intended to and does refer to the index numbers of copper, being Commodity No. 472.1, and lead, being Commodity No. 473," both of which are individual commodities, and are two of the twenty individual commodities comprising the fourth subgroup entitled "Non-ferrous Metals," which is in turn one of the five subgroups comprising the group entitled "Metals and Metal Products."

(b) Metals and Metal Products, as a group, as listed in the United States Department of Labor, index of wholesale prices compiled monthly by the United States Department of Labor, is a "subgroup" under "All Commodities."

(c) The contract provisions that the contract price was subject to adjustment for changes in "material costs were not intended to and do not refer to said Metals and Metal Products as a group or subgroup for the purpose of taking the index numbers of Metals and Metal Products as a group for use in computing any increase or decrease of the contract price."

(d) The reference by the contract provision that fifty per cent of the contract price representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for Metals and Metal Products compiled monthly by the United States Department of Labor, "was intended solely as a reference to the appropriate place in said 'Index Numbers of Individual Commodities' under which the index numbers for copper and lead were to be found."

(e) The monthly mimeographed publications of the United States Bureau of Labor Statistics "are examples of the publications intended to be referred to by the Price Adjustment Clause of said contract as the proper source from which are to be taken the index numbers relating to lead and copper as constituting the material used in said cable."

(f) The monthly publication entitled "Labor Review" (Defendants' Exhibit "O") is not an example of the monthly publication referred to or intended to be referred to by the provisions of the Price Adjustment Clause in the contract.

(g) The groups and subgroups of commodities

contained in the "Monthly Labor Review" are a reprint and are not up-to-date when published.

(h) "Whenever said Price Adjustment Clause in said contract refers to 'material' or 'increases in material costs' or 'decreases in material costs' or similar words or phrases, the word 'material' or 'materials' refers to copper, electrolytic, delivered Connecticut Valley, and lead, pig, desilverized, f.o.b. New York, which are the principal component parts of the cable referred to in said contract."

(i) A formula or any method or manner of computing percentages of increase of index numbers relating to copper and lead in said "Index Numbers of Individual Commodities" for the periods from April, 1946, through October, 1946, and April, 1946, through January, 1947, and April, 1946, through March, 1947.

(j) The manner or the method or the formula by which said percentages for said three periods last mentioned are related to the contract price.

(k) The appellee is entitled to recover, "in addition to all amounts heretofore paid by defendants to plaintiff," the sum of \$9,996.69, with interest at seven per cent per annum from May 1, 1947, or any other sum.

(l) The appellee is entitled to recover interest at seven per cent per annum upon the principal amount of the judgment, or at any rate on any sum.

(m) The adjustment of the contract price on the basis of the composite index for the group entitled "Metals and Metal Products" would render the

contract payment clause unfair or unreasonable or inaccurate or speculative.

(n) The construction set forth in the Findings renders the contract payment clause reasonable or fair or definite, and it is the only construction which the parties, as reasonable business men, could have had in contemplation when the contract was executed.

(o) The allegation in Paragraph IX, page 13, lines 13 to 26, of defendants' Answer is untrue.

5. The evidence is insufficient to support the judgment of the Court herein in each of the particulars hereinbefore specified and set forth under Paragraphs 2(a) to (o), inclusive.

6. The Findings of Fact and Conclusions of Law herein are contrary to the facts and are not supported by the evidence.

7. The Judgment herein is contrary to the facts and the evidence is insufficient to support the Judgment.

8. The contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, and not interpreted using "hind sight."

9. The wording of the contract is not ambiguous and must be interpreted to give effect to the mutual intention of the parties, which clearly was to have the price adjusted upon the basis of the index for the "Metals and Metal Products" group.

10. This is a contract between a public body and a private party and so it is presumed that any uncertainties in the language of the contract were

caused by the appellee and that it should be interpreted most strongly against it.

11. The sending of six invoices and accepting payment therefor based upon the group index rather than the individual commodities index is the best evidence of the intention of the parties in the making of this contract, and should be adopted and enforced by the Court.

II.

Designation of all the Record which is Material to the Consideration of the Appeal

Appellants' designation of all the record which is material to the consideration of the appeal herein is as follows:

Title of Document	Pages of Official Certified Record
Answer	8- 26
Complaint for Money Due on Contract....	2- 7
Decision of the Court	71- 73
Defendants' Motion for New Trial	94-116
Designation of Record on Appeal, Appel- lants	131-133
Designation of Record on Appeal, Appellee	134-136
Findings of Fact and Conclusions of Law.	74- 88
Judgment for Money Due under Contract.	89- 93
Minute Order Entered May 2, 1949	126
Notice of Appeal	130
Order Extending Time to File Record on Appeal	137-138
Order Extending Time to File Record on Appeal	139-140

All of the Reporter's Transcript of Proceedings for February 23 and February 24, 1949, together with Plaintiff's Exhibits 1 to 3, inclusive, and Defendants' Exhibits "A" to "O," inclusive. (Appellants desire and intend to apply to the Court for an order dispensing with the printing of these voluminous exhibits, many of which are in printed form, in order to save the cost of printing.)

Dated: Los Angeles, California, August 23, 1949.

/s/ RAY L. CHESEBRO,

City Attorney.

/s/ GILMORE TILLMAN,

Chief Assistant,

City Attorney for Water
and Power.

/s/ RUSSELL B. JARVIS,

Assistant City Attorney.

/s/ GERALD LUHMAN,

Deputy City Attorney,

Attorneys for Defendants
and Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 23, 1949. U.S.D.C.

[Endorsed]: Filed Aug. 25, 1949. U. S. C. A.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD
MATERIAL TO CONSIDERATION OF AP-
PEAL (RULE 19, USCA—9)

In addition to those documents, records and ex-
hibits designated by appellants as being material to
the consideration of the appeal herein, appellee
hereby designates the following documents:

Title of Document	Pages of Official Certified Record
Defendants' memorandum prior to trial...	60- 70 inclusive
Plaintiff's pre-trial points and authorities pursuant to Local Rule 12	27- 59 inclusive

Dated at Los Angeles, California, this 25th day
of August, 1949.

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff and
Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 29, 1949.

[Title of Court of Appeals and Cause.]

1. APPLICATION OF APPELLANTS FOR
ORDER DISPENSING WITH PRINTING
OF EXHIBITS
2. ORDER DISPENSING WITH PRINTING
OF EXHIBITS

Application of Appellant for Order Dispensing
with Printing of Exhibits

Come Now the Department of Water and Power of the City of Los Angeles and the City of Los Angeles, a municipal corporation, appellants in the above-entitled action, through the City Attorney of Los Angeles, and respectfully represent as follows:

All of the exhibits introduced in evidence at the trial of the above-entitled action are included in the Designation of Record Material to Consideration of Appeal herein filed August 25, 1949, being Plaintiff's Exhibits 1 to 3, inclusive, and Defendants' Exhibits "A" to "O," inclusive, and are classified generally as follows:

1. About 141 pages printed material. (See Plaintiff's Exhibits 1 and 3; Defendants' Exhibits "N" and "O.")
2. About 73 pages mimeographed material. (See Plaintiff's Exhibit 1; Defendants' Exhibits "A" and "L.")
3. About 45 pages typewritten material, including completed printed forms and 15 pages photostatic material. (See Plaintiff's Exhibit 2;

Defendants' Exhibits "A," "B," "K" and "M.")

4. Three pages printed and hand-made drawings and charts (some in color). (See Defendants' Exhibits "C" and "D.")
5. Physical material: Six small sections of lead-covered cable. (Defendants' Exhibits "E" through "J.")

The clerk of the above-named Court has estimated the cost of printing the transcript included in the Designation of Record Material to Consideration of Appeal filed herein to be \$340.00, exclusive of any exhibits.

There are in all about 262 pages of exhibits. More than 140 pages of the exhibits are printed matter issued by the United States Department of Labor. There are 49 pages of exhibits consisting of mimeographed material also issued by the United States Department of Labor. As many copies of these Department of Labor publications as are desired will be furnished the Court upon request if they can be secured from the United States Government Printing Office.

If additional copies are requested by the Court, appellants offer to furnish as many copies as may be requested of Plaintiff's Exhibit 2 and Defendants' Exhibits "A," "B," "C," "D," "M" and "N."

Appellants make this request in order to save the cost of printing these exhibits and supervision of printing by the Clerk, all of which would amount

to a substantial sum, estimated by appellants to be in excess of \$600.00.

Wherefore, appellants respectfully request that the Court make its order herein dispensing with the printing of all exhibits in connection with the appeal of this action.

Dated: Los Angeles, California, August 31, 1949.

/s/ RAY L. CHESEBRO,

City Attorney.

/s/ GILMORE TILLMAN,

Chief Assistant,

City Attorney for Water
and Power.

/s/ RUSSELL B. JARVIS,

Assistant City Attorney.

/s/ GERALD LUHMAN,

Deputy City Attorney.

STIPULATION

It Is Hereby Stipulated by the Okonite-Callender Cable Company, Incorporated, appellee in the above-entitled action, that the Court herein may make its order dispensing with the printing of all exhibits included in the Designation of Record Material to Consideration of Appeal herein.

Dated: Los Angeles, California, September 1, 1949.

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff
and Appellee.

ORDER DISPENSING WITH PRINTING OF EXHIBITS

The Court having considered the application of the Department of Water and Power of the City of Los Angeles and The City of Los Angeles, a municipal corporation, appellants in the above-entitled action, for an order dispensing with the printing of all exhibits in this action, and the agreeing stipulation of appellee.

It Is Hereby Ordered that the printing of Plaintiff's Exhibits 1 to 3, inclusive, and Defendants' Exhibits "A" to "D" and "K" to "O," inclusive, be and the same is hereby dispensed with.

Dated: September 7, 1949.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ HOMER T. BONE,
Circuit Judge.

.....
Circuit Judge.

[Endorsed]: Filed Sept. 8, 1949.

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No. 12337.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF
LOS ANGELES, THE CITY OF LOS ANGELES, a municipal
corporation,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Statement of Jurisdiction.

The statutory provisions sustaining the jurisdiction of the District Court of the United States, in and for the Southern District of California, Central Division, are found in 28 U. S. C. 1332.

The complaint alleges, the answer admits and the District Court found that the plaintiff and appellee is a corporation, incorporated under the laws of the State of New Jersey, having its principal office in Paterson, New Jersey; that the defendant and appellant Department of Water and Power of the City of Los Angeles is a department of the defendant and appellant The City of Los Angeles, a

municipal corporation, organized and existing under and by virtue of the laws of the State of California, and both have their principal office in Los Angeles, California, and both are citizens of the State of California; and that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs. [T. of R. pp. 2, 3, 9, 79-80.]

The statutory provisions sustaining the jurisdiction of this Court to review the District Court's judgment are found in 28 U. S. C. 1291 and 1294. This judgment is not one in which a direct appeal may be had in the Supreme Court under 28 U. S. C. 1252.

The District Court, after trial on the issues, made its Findings of Fact and Conclusions of Law and entered its Judgment that the plaintiff and appellee have and recover from the defendants and appellants the sum of \$9,996.69, together with interests and costs. [T. of R., pp. 78-96.] This is an appeal from that judgment which constituted a final decision of the District Court.

II.

Statement of the Case.

The Department of Water and Power of The City of Los Angeles, hereinafter referred to as the "Department", advertised for sealed bids for the furnishing and delivery of paper-insulated lead covered cable.

The Okonite-Callender Cable Company, Incorporated, a corporation, hereinafter called "appellee", submitted its signed, sealed proposal, with its affidavit of noncollusion and bidder's bond, proposing to furnish six of the sixteen items of cable.

Appellee was awarded a contract dated May 21, 1946, for the furnishing of the six items of cable for \$91,096.00,

and other bidders were awarded contracts for the remaining ten items. Appellee furnished and delivered all of the material in accordance with the terms of the contract.

The contract contained a Price Adjustment Clause providing that the contract price of \$91,096 was to be subject to adjustment for changes in labor and material costs. Labor costs are not involved in this case.

The Department has paid appellee the full unadjusted contract price of \$91,096.00. It has also paid \$1,392.85 agreed by both parties to be the amount due under the contract Price Adjustment Clause for labor costs. It has paid \$4,205.84, under the Price Adjustment Clause, on account of changes in material costs, making a total payment of \$96,694.33, plus taxes, and contends that constitutes payment in full.

For the purpose of adjustment, the portion of the contract price representing material was stated to be 50 per cent or \$45,548.00. This amount was to be adjusted for increases in material costs. The adjustment was "to be based on the index of wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the U. S. Department of Labor." [T. of R. pp. 12-13, 33, 85; Defts. Ex. A, p. 11.] The average of the monthly index figures for April, 1946, to and including the month specified for final shipment, was to be computed and the percentage of increase, if any, was to be secured by a comparison of such average monthly material index figure with the material index figure for April, 1946. The adjustment for increases in material was to be obtained by

applying such percentage of increase to \$45,548.00 and the result was to be accepted as an increase in the contract price.

An "Index of Wholesale Prices" was "compiled monthly by the U. S. Department of Labor," entitled "Average Wholesale Prices and Index Numbers of Individual Commodities" for April, 1946, through March, 1947. [Pltf. Ex. 1.] These tables showed the average wholesale price and index number for each of more than 850 commodities used in constructing the wholesale price index, and also showed the index numbers of wholesale prices by groups and subgroups for the period. After stating the index figure for "All Commodities," the table is divided into ten major groups of commodities, the sixth one of which is entitled "Metals and Metal Products."

The appellants computed the price adjustment for materials based on the index figure for this sixth group, "Metals and Metal Products." This amounted to \$4,205.48, which has been paid. Appellants contended in the District Court and contend here that this was the "Index of Wholesale Prices for 'Group VI—Metals and Metal Products'" and that nothing is due, owing and unpaid to appellee.

Each of these ten major groups of commodities in the table was divided into subgroups of commodities. The sixth of these ten major groups, "Metals and Metal Products," was divided into five subgroups. One of these subgroups is entitled "Nonferrous Metals." Two of the commodities included in this subgroup of "nonferrous

metals” are “Copper, electrolytic, delivered Connecticut Valley,” and “Lead, pig, desilverized, f. o. b. New York.”

The trial court found in effect that the index figures for these *two* commodities in a subgroup of the sixth group was the “Index of Wholesale Prices for ‘Group VI—Metals and Metal Products’ ” referred to in the contract and that the mathematical average of the two index figures was to be used to obtain a percentage figure. This percentage of \$45,548.00, less payments made, is the amount of the judgment, \$9,996.69.

Appellee, as plaintiff, brought this action against appellants, as defendants, to recover the sum of \$9,996.90, with interest at seven per cent per annum from March 1, 1947, until paid.

Appellants answered denying additional liability under the contract.

The action was tried; Findings of Fact and Conclusions of Law made and entered, and Judgment that plaintiff and appellee have and recover \$9,996.69, with interest at seven per cent per annum from May 1, 1947, from defendants and appellants was made and entered. Appellants filed their Motion for a New Trial; Setting Aside and Amending Findings of Fact and Conclusions of Law; and Altering and Amending, and Vacating and Setting Aside Judgment, and Points and Authorities in Support Thereof. The District Court denied appellants’ motions. Appellants filed a timely Notice of Appeal to this Court from the final judgment entered in this action March 15, 1949.

III.

Specifications of Error.

1. The Court erred in making its Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16 and 17 [T. of R. pp. 87-93] and its Conclusions of Law [T. of R. pp. 93-94] that the Price Adjustment Clause in the contract was intended to refer to and requires a reference to and use of the *individual* commodity index numbers of copper and of lead in said "Average Wholesale Prices and Index Numbers of Individual Commodities," as published monthly in mimeographed form by the U. S. Department of Labor, Bureau of Labor Statistics, at Washington, D. C., from and including April, 1946, to and including March, 1947, and that said clause does not refer to, and was not intended to refer to, any index numbers of "Metals and Metal Products" as a *group* or *subgroup* in said publications, for the reason that those Findings of Fact and Conclusions of Law are clearly erroneous, the evidence being without conflict and insufficient to support them.

2. The Court erred in making its Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16 and 17 for the reason that they are clearly erroneous, being contrary to the facts as shown by all the evidence.

3. The Court erred in making its Judgment in favor of appellee for the reason that the evidence is without conflict and insufficient to support the Judgment, which is against the evidence and therefore clearly erroneous.

4. It was error for the trial court to admit the testimony of Mr. Metz, a witness for the plaintiff, and to deny appellants' motion to strike said testimony as follows:

(1) That he had occasion to make a calculation of the lead and copper compared with other material involved in

the contract. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: We object upon the ground the question is immaterial.

The Court: It is merely preliminary.

Mr. Jarvis: We think it is irrelevant and immaterial. The contract speaks for itself. It is not necessary to resort to extrinsic evidence to determine the meaning.

The Court: Overruled." [T. of R. p. 109.]

(2) That the cost of copper and lead was 90 per cent of the cost of all material used in the cable. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: I object to this question upon the same ground previously stated. Also upon the ground that the cost is indefinite as to the cost to whom, and based upon what cost.

* * * * *

Mr. Prince: I will stipulate that the same objection may be made to all of this testimony.

Mr. Jarvis: I would like to renew my objection.

The Court: The objection is overruled." [T. of R. pp. 109, 110.]

(3) That when this contract was entered into in May, appellee did not have on hand a sufficient quantity of copper and lead to cover this contract. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: We ask that the answer go out. We have the same objection, that it is irrelevant and immaterial.

The Court: I will hear the evidence on the subject. I think the factual basis is very limited.” [T. of R. p. 110.]

(4) That appellee did not have sufficient copper and lead on hand to meet the requirements of this contract at the time the bids were put in or at the time the contract was entered into in May, 1946, and that copper and lead at that time were controlled by the Government and one was only permitted to have what copper and lead one could use for his production in the following month, resulting in appellee’s having to purchase from time to time its copper and lead requirements. Appellants’ objection to this evidence was as follows:

“Mr. Jarvis: Same objection.

The Court: Overruled.” [T. of R. p. 111.]

(5) That the approximate amount for copper and lead that appellee had to pay over and above April and May quotations for copper and lead, and that the actual cost of the copper and lead over April prices and the amount of the increase of copper and lead material was about \$24,000. Appellants’ objection to this evidence was as follows:

“Mr. Jarvis: I would say that may be out of order, your Honor. In the orderly procedure we should have the contract in evidence and introduced for the court to determine whether it is material for the court to hear this type of evidence.

(Discussion.)

“The Court: Overruled.” [T. of R., p. 111.]

(6) Appellants' motion to strike all of said testimony was as follows:

"Mr. Jarvis: Upon the grounds which we have specified in our objections we move to strike all the testimony of Mr. Metz on direct examination.

The Court: Motion denied." [T. of R. p. 112.]

(7) Appellants' motion to strike was as follows:

"Mr. Jarvis: We have three motions to strike directed to particular portions of Mr. Metz's testimony.

The first is, the defendants move to strike the part that 90 per cent of the value of the material going into the manufacture of this cable is made up of lead and copper.

The second motion—

The Court: Let us have one at a time.

Mr. Jarvis: —on the ground that the evidence is incompetent, irrelevant and immaterial.

The Court: The motion will be denied.

Mr. Jarvis: And the second motion to strike the testimony of Mr. Metz is that the material which they actually used in the manufacture of this cable under this contract actually cost more than \$24,000 than it cost at the time they entered into the contract. In other words, during the month of April, 1946, it doesn't matter to the court in interpreting the contract whether the plaintiffs made a profit or loss.

The Court: It indicates there was a substantial increase in price. It is similar to the situation that arises in a patent lawsuit; in other words, to show that the invention has been reduced to practice you may show the sale, not as an indication of damages, but to show it was not a proper payment. The object of having this in is to show that there was a substantial fluctuation in price, although the testimony that there was an increase, whether it was great or small, is not material. I think I will allow it to stand, to show that it was substantial.

Mr. Jarvis: The third motion to strike would be the testimony of Mr. Metz as to Code No. 472.1 being used by the Department of Labor, and the specifications did comply with the specifications set out in this contract, being the same code number, and we fail to see how the use of such code number has any bearing on this case. I don't know that the matter is of much moment.

(Argument.)

The Court: Motion denied." [T. of R. pp. 133-134.]

5. The Court erred in making its Findings of Fact and Conclusions of Law and its Judgment that appellee recover interest at seven per cent per annum on \$9,996.69 from May 1, 1947, to March 14, 1949, the date of judgment in this case, amounting to \$1,306.21, for the reason that interest prior to judgment cannot be recovered against a municipality in the absence of special statutory authorization or contract therefor.

IV.

Summary of Argument.

The findings of the District Court that the monthly indexes for lead and copper were intended by the parties is not binding and may be set aside where clearly erroneous.

It is a question of law for this Court to determine whether any uncertainty or ambiguity exists in the contract. None exists here because the language is not reasonably susceptible of more than one meaning.

The testimony of appellee's witness, Mr. Metz, as to the cost of lead and copper did not pertain to the circumstances surrounding the making of the contract and enable the Court to place itself in the same situation in which the parties found themselves at the time of contracting, but generally concerned matters subsequent to execution of the contract, and the hardship suffered by appellee. Neither this nor his testimony as to other matters raised any conflict in the evidence as to the circumstances surrounding the making of the contract.

There is no conflict in the evidence that the term "group" has a clear and well-defined meaning when used with the phrase "Index of Wholesale Prices * * * compiled monthly by the U. S. Department of Labor," and that "Metals and Metal Products" is the sixth group in the index and is not a subgroup under "All Commodities."

There is no conflict in the evidence that the parties intended that the group index rather than the index figures for lead and copper were to be used for adjustment for increases in material costs. This intent on the part of the Department is shown by Mr. Foster's testimony.

The Price Adjustment Clause contained eleven features of a nature which limited price adjustment in many respects.

If the contract does not provide for adjustment based upon the group index there is no provision for price adjustment. The contract does not contain any formula for price adjustment based upon the use of the index figures for lead and copper; nor is there any logical basis for price adjustment being made with equal weight given to each.

Even if the contract were uncertain or ambiguous in its wording, appellee's conduct in presenting and receiving payment on six invoices for price adjustment for over two-thirds of the unadjusted contract price is a practical construction placed by appellee upon the contract and is the best evidence of its intention in executing the contract. This construction is not at variance with the correct legal interpretation of the contract. It is the duty of the Court to give effect to the intention of the parties.

This action was for money due under contract, with interest prior to judgment. In California, unless there is express statutory authority or provision in the contract for the payment of interest prior to judgment, no recovery of such interest can be had against a municipality. Interest can only be recovered from the date of judgment. If appellee was entitled to judgment herein, it would be entitled to interest only from the date of judgment.

V.

ARGUMENT.

1. The District Court's Finding That the Monthly Indexes for Lead and Copper Were Intended by the Parties Is Not Binding and May Be Set Aside Where Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure prescribes that findings in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *United States v. United States Gypsum Co.* (Mar. 1948), 333 U. S. 364, at 394 and 395, the court held that under the rule a finding of fact by the trial court is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. This was an appeal by the Government from an order of dismissal at the end of the presentation of its case before a three-judge court. The Supreme Court reversed the order and remanded the case for further proceedings. In effect, the court said that judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by a jury. So the court may reverse the findings by a trial court where clearly erroneous. In this case the Government relied very largely upon documentary exhibits and called as witnesses the authors of the documents. The court said that where testimony is in conflict with contemporaneous documents,

the court could give it little weight, particularly where the crucial issues involve mixed questions of law and fact. So despite the opportunity of the trial court to appraise the credibility of the witnesses, it could not under the circumstances rule otherwise than that the finding was clearly erroneous.

This court in *Gates v. General Casualty Co. of America* (1941, 9 Cir.), 120 F. 2d 925, at 929, stated that under Rule 52(a) of the Federal Rules of Civil Procedure the court has a broader power of review than the courts of appeal in the State of California. The District Court's finding in that case was held clearly erroneous. Just preceding this statement the court says that where the issue on such a contention is involved and the trial court may make inferences from it favoring either party, the appellate court in California will not assume to retry the case.

This court in *Mateas v. Fred Harvey* (1945, 9 Cir.), 146 F. 2d 989, reversed the finding of the District Court, that the evidence presented could not support the inference either of neglect or of violation of warranty, on the ground that it was "clearly erroneous." The District Court tried this case without the aid of a jury, and at the close of plaintiff's case granted the motion of defendant and appellant to dismiss.

It is well settled that an appellate court in California is not bound by the trial court's construction of a contract or other written instrument based solely upon the terms of the instrument.

Trubowitch v. Riverbank Canning Co. (1947), 30 Cal. 2d 335, at 339, 182 P. 2d 182.

There are many other California cases stating this rule in varying situations, such as where no evidence is offered or received for the purpose of showing the intention of the parties (*Moore v. Wood* (1945), 26 Cal. 2d 621, at 629, 160 P. 2d 772); where there is no conflict in the evidence, or where a determination has been made upon incompetent evidence (*Estate of Platt* (1942), 21 Cal. 2d 343, 352); where parol evidence of an oral promise by defendants' predecessor antedating the contract was incompetent as varying the terms of the contract where there was no uncertainty in the language (*Rilovich v. Raymond* (1937), 20 Cal. App. 2d 630, 639-640); where there was no conflict in the evidence introduced in aid of construction (*Moffatt v. Tight* (1941), 44 Cal. App. 2d 643); where there was no evidence of any negotiations leading up to the agreement and there was nothing in the circumstances of the parties at the time they made the agreement to show what they had in mind (*Thompson v. Levereau* (1944), 66 Cal. App. 2d 795, at 806); where the contract was clear and unambiguous and susceptible of only one interpretation (*Herzog v. Blatt* (1947), 80 Cal. App. 2d 340, 344); where no extrinsic evidence was taken (*Ohran v. National Automobile Insurance Co.* (1947), 82 Cal. App. 2d 636, at 648; *Transport Oil Co. v. Exeter Oil Co.* (1948), 84 Cal. App. 2d 616, at 620, 191 P. 2d 129); where there was no substantial conflict in the evidence (*MacDonald v. Rosenfeld* (1948), 83 Cal. App. 2d 221, at 237, 188 P. 2d 519).

Appellants respectfully submit that appellate courts of the State of California have, under the authorities cited, very broad powers of review in cases where there is no extrinsic evidence to aid in the interpretation of a contract, or there is no conflict in the evidence, or the trial court considered testimony improperly admitted, and in such instances the construction of the contract by the trial court presents a question of law which the appellate courts must determine.

Appellants submit that the present case comes within the California rule, as shown by the foregoing authorities, as well as within the Federal Rule; that the Findings of Fact and Conclusions of Law and the Judgment of the District Court are clearly erroneous for the reason that the contract was not uncertain or ambiguous. Mr. Metz's testimony regarding subsequent matters was incompetent evidence and could not properly be considered in interpreting the contract; that his testimony did not pertain to the circumstances surrounding the making of the agreement and the remaining evidence shows without conflict that the words used in the clause refer to the group index for "Metals and Metal Products." To state it another way, all the remaining evidence is wholly consistent with and supports the meaning obtained from a plain reading of the language.

2. It Is a Question of Law for This Court to Determine Whether Any Uncertainty or Ambiguity Exists in the Contract and None Exists Here Because the Language Is Not Reasonably Susceptible of More Than One Meaning.

This case came before the District Court on the ground of diversity of citizenship and is governed by the law of the State of California.

28 U. S. C. 1652;

Erie R. R. Co. v. Tompkins (April 25, 1938), 304 U. S. 64, 82 L. Ed. 1188.

In *Brant v. California Dairies, Inc.* (1935), 4 Cal. 2d 128, the court at page 133 says in construing a contract the question of whether any uncertainty or ambiguity exists is one of law and the lower court's finding on this issue is not binding on appeal.

The same rule is stated in *Whiting Stoker Co. v. Chicago Stoker Corp.* (7 Cir., 1948), 171 F. 2d 248. (Citing 17 Corpus Juris Secundum, Contracts, Sec. 617, and cases.) The court says a contract is ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions. It is not ambiguous if the court can determine its meaning without any guide other than a knowledge of simple facts on which, from the nature of the language in general, its meaning depends. A contract is not rendered ambiguous by the mere fact that the parties do not agree upon its proper construction. An ambiguous contract is one capable of being understood in more senses than one; an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning. The court says a possibility of doubt is not sufficient, for it is out of such possibilities that controversies arise. It is the

duty of the court to ascertain by judicial interpretation, not whether a doubt may be asserted, but whether any ambiguity really exists. There are many similar judicial expressions and they may be summarized by saying that a contract is ambiguous when the language used is reasonably susceptible of more than one meaning.

In *Ogburn v. Travelers Ins. Co.* (1929), 207 Cal. 50, at 52, the court states that in the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties, and this rule is recognized in Section 1636 of the Civil Code. The intention is to be ascertained from a consideration of the language employed and the subject-matter of the agreement. It should be construed as an entirety.

In *Universal Sales Corp. v. California Press Manufacturing Co.* (1942), 20 Cal. 2d 751, 760-762, the court said the first rule respecting interpretation is that the court may not apply one of the well recognized rules as an aid in its construction of a contract until it is first satisfied that the language is fairly susceptible of two different interpretations.

In *Beaumon v. Kittle Manufacturing Co.* (1932), 122 Cal. App. 547, 549, it is said that a court cannot and should not attempt to wrench the language from its ordinary meaning and where a document is not ambiguous, no construction is allowable.

In *Rabbit v. Union Indemnity Co.* (1934), 140 Cal. App. 575, at 585, the court said the intention of the parties as it existed at the time of contracting is to be determined by the court. This is based on California Civil Code, Section 1636.

The contract in this case was awarded on competitive sealed bids. There were no negotiations preliminary to the execution of the contract in the usual sense although prior to March 29, 1946, the date of advertising for bids, a draft of the Price Adjustment Clause which was later used in this contract was given to appellee's representative. He later told Mr. Foster, Purchasing Agent for the Department, that appellee would bid in response to the advertisement. [T. of R. pp. 138-140.] The contract consists of one page, to which is attached the contractor's bond, appellee's proposal dated April 9, 1946, instructions to bidders, general conditions, detailed specifications and standard specifications. The Price Adjustment Clause appears on pages 10, 11 and 12 of the detailed specifications attached to appellee's proposal. [Deft. Ex. A; T. of R. p. 114.] Appellee had from some time in March, until April 9, 1946, the date of its proposal, in which to consider the clause.

The full price adjustment clause appears three times in the Transcript of Record, pages 11 to 14, inclusive; pages 32 to 35, inclusive, and pages 83 to 87, inclusive, and in Defendants' Exhibit A at pages 10, 11 and 12, so it is not repeated here at length. Appellants' success or failure in this appeal rests upon the meaning of one sentence of the clause, reading as follows:

"b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the U. S. Department of Labor. * * *" [T. of R. p. 85.]

In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.

Section 1858 of the Code of Civil Procedure of the State of California.

The District Court did not ascertain and declare what was in terms and in substance contained therein; but on the contrary inserted what was omitted and the findings omit what has been inserted. The court wrote a new contract.

Appellants will demonstrate this is so, by showing as stricken and by underscoring the language omitted and required to be inserted in order to write a clause with the meaning given by the findings.

"2. Material:

"(a) For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

"(b) The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the mathematical average of the index of wholesale prices for ~~'Group VI,~~ copper, electrolytic, delivered Connecticut Valley, and for lead, pig, desilverized, f. o. b. New York, as set forth in the subgroup entitled 'Nonferrous metals' in the group entitled Metals and Metal Products', compiled monthly by the U. S. Department of Labor. The mathematical average of the monthly material index figures for the two commodities for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will

be secured by a comparison of such average monthly material index figure with the mathematical average of the two material index figures for the Base Month.

* * *

“(c) If the average monthly material index figure computed as provided in paragraph b, is less than the mathematical average of the two material index figures for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941, figure will be computed.”

The foregoing demonstrates, we submit, that the contract was not “construed according to its plain meaning.” The correct rule is stated in *Lowber v. Bangs*, 69 U. S. 728, 17 L. Ed. 768, 769, as follows:

“‘The construction to be put upon contracts of this sort depends upon the intention of the parties, to be gathered from the language of the individual instrument. * * * All mercantile contracts ought to be construed according to their plain meaning, to men of sense and understanding, and not according to forced and refined constructions, which are intelligible only to lawyers, and scarcely to them.’ * * *

“Contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in this controversy.
* * *

With these rules in mind, appellants submit that the remaining portions of this brief will show that the contract was not uncertain or ambiguous, and that all of the competent evidence which could be considered in interpreting the contract shows that the District Court’s findings as to which index was intended were clearly erroneous.

3. Mr. Metz's Testimony as to the Cost of Lead and Copper Did Not Pertain to Circumstances Surrounding the Making of the Agreement but to the Hardship Suffered by Appellee Subsequently and None of His Testimony Raised Any Conflict in the Evidence.

The trial court may look into the circumstances surrounding the making of an agreement (Civ. Code, Sec. 1647), including the object, nature and subject-matter of the writing and the preliminary negotiations between the parties, and thus place itself in the same situation in which the parties were at the time of contracting. (*Universal Sales Corp. v. California Press Manufacturing Co.*, 20 Cal. 2d 751 at 761.)

As shown in appellants' Specifications of Error No. 4, the District Court overruled appellants' objections to portions of the testimony of Mr. Metz, a witness for the plaintiff. Appellants' motions to strike this testimony were also denied by the court. These portions of Mr. Metz's testimony were that he had occasion to make a calculation of the lead and copper compared with other materials involved in the contract and that their cost was 90 per cent of the cost of all materials used in the cable; that appellee did not have sufficient quantity of copper and lead on hand in May, 1946, to cover this contract; that copper and lead were controlled by the Government and that only purchases for use in production in the following month could be made, and that appellee had to pay about \$24,000 more for the copper than its price was in April and May, 1946.

His testimony as to percentage of cost and the total cost and subsequent purchases pertained to matters which occurred *after* the execution of the contract. While it does

not raise any conflict in the evidence this could not assist the court in the performance of its duty in ascertaining the intent of the parties because it did not relate to the circumstances surrounding the parties at the time they contracted. It did not pertain to the object or the nature or the subject-matter of the agreement. There were really no preliminary negotiations here, although appellee's representative was given a copy of the Price Adjustment Clause prior to advertising, bids were advertised for and sealed bids were received. This testimony was all of a "hindsight" and hardship nature. Calculations of the cost of lead and copper with the cost of other materials could only be made after the contract was completed. Neither party knew, when the contract was executed, that lead and copper would cost 90 per cent of the cost of all the materials,—that is, the cost to appellee. The continuance of government control of purchases and the purchase of lead and copper during the period of manufacture, like their cost, was all subsequent to execution.

The same is true as to the actual cost of copper and lead being \$24,000 more than the cost in April, 1946. Neither party knew this at the time of execution. It was not possible for them to know this until afterwards.

No authority sustains the proposition that under the guise of construction or explanation, a meaning can be given to an instrument which was not found in the instrument itself but is based entirely upon direct evidence of intention independent of the instrument. (*Brant v. California Dairies, Inc.*, 4 Cal. 2d 128 at 133.) Mr. Metz's testimony was the converse of Carver's in the *Brant* case as to his intention when he executed the contract. Mr. Metz's testimony is as to facts subsequent to the contract and was fully as irrelevant, immaterial and

therefore inadmissible under the parol evidence rule as was Carver's.

The Court's finding that, in buying lead and copper for this contract, appellee "was reasonably required to pay and did pay for said lead and copper prices in excess of the market price of said lead and copper in the month of April, 1946, and said excess actual cost was substantially more than the amount which plaintiff seeks to recover herein by virtue of said price adjustment clause, and substantially more than the amount herein sought to be recovered added to all payments heretofore made by defendants to plaintiff on account of said price adjustment clause" [T. of R. p. 88] is fully as irrelevant and immaterial as the evidence. It is based upon inadmissible "hindsight" evidence. We respectfully submit that the court's decision was improperly influenced by and based upon "hindsight."

Mr. Metz's testimony on this point was not only inadmissible, but by reason of its nature it could not have been of any aid or assistance to the District Court in interpreting the intent of the parties to this contract. It did not inform the court of any circumstances surrounding the making of the agreement. The only possible effect which it could have had was to influence the court's decision in appellee's favor because it had paid about \$20,000 more for lead and copper than it had been compensated for at the time of trial. Where the court has improperly received evidence and made a determination upon such evidence, its finding is not binding upon the appellate court. With or without this testimony there is no conflict whatsoever in the evidence as to any circumstances surrounding the making of the agreement. It was not properly admitted but neither could it or testi-

mony as to the quantity of lead and copper on hand in May, 1946, and government control of their purchase at that time have been of any aid or assistance in interpreting the intent of the parties. The remaining portions of his testimony were in complete agreement with the testimony of Mr. Gray, a witness for appellant, and Defendants' Exhibits B, C, and D.

4. **The Evidence Shows Without Conflict That the Term "Group" Has a Clear, Well-Defined Meaning When Used in Connection With "The Index of Wholesale Prices * * * Compiled Monthly by the U. S. Department of Labor," and That "Metals and Metal Products" Is the Sixth Group in Such Index and Is Not a Subgroup Under "All Commodities."**

The following discussion deals with Defendants' Exhibit A (the contract) and the U. S. Department of Labor, Bureau of Labor Statistics publications in evidence in Defendants' Exhibit O ("Monthly Labor Review"), Plaintiff's Exhibit 1 (Bulletin No. 920 and Monthly Mimeographed Releases) and Plaintiff's Exhibit 3 ("Monthly Labor Review"). These publications and their use of the terms "All Commodities," "group" and "subgroup" proves conclusively that "Metals and Metal Products" has been treated as a group by the Bureau of Labor Statistics continuously since 1902, when it started to issue an official wholesale price index. This index was extended by the Bureau on a monthly basis back to 1890, and on an annual basis as far back as 1749. Separate monthly indexes have been prepared by the Bureau and are available for major groups of commodities from the year 1890 and for most of the subgroups from 1913.

[Pltf. Ex. 3, "Monthly Labor Review," August, 1948, p. 155.]

The classification of more than 850 commodities by the Department of Labor into groups and subgroups is illustrated in seven (7) different places in the exhibits in evidence in this case.

Plaintiff's Exhibit 1 shows the grouping in five places. Bulletin No. 920 contains Table 1 on pages 11 and 12; Table 2 on page 13, and Table 12 on pages 37 to 137. The title to Tables 1 and 2 refers to index numbers of primary market prices, by *groups* and *subgroups* of commodities, and Table 12 refers to primary market prices index numbers and relative importance of commodities.

The three monthly mimeographed releases for January, February and March, 1947, are also a part of Plaintiff's Exhibit 1. Each contains two tables. One shows the average wholesale prices and index numbers of individual commodities, and the other (Appendix, last page) the index numbers of wholesale prices by *groups* and *subgroups* of commodities.

Defendants' Exhibit O is a copy of the "Monthly Labor Review" for June, 1946, Volume 62, No. 6, and contains Table 1 and Table 2 on pages 974 and 975. The titles have similar wording: "Indexes of Wholesale Prices by Groups and Subgroups of Commodities * * *"; and "Index Numbers of Wholesale Prices by Groups of Commodities."

In all tables the same *groups* and *subgroups* are found. The *sixth group* is always "Metals and Metal Products," and this group has an index number or figure in each instance.

Individual commodity index numbers are only shown in Table 12 in Bulletin No. 920 and one of the tables in the monthly mimeographed releases.

The compiler of the tables was consistent in the grouping and followed a fixed arrangement. To anyone having knowledge of and familiarity with the tables, the contract clause clearly intends the group index for the sixth group. Both the use of the Roman numeral and the title "Metals and Metal Products" indicated the group index number, not the index figure for lead or for copper, because if that had been intended it would have been so easy to have said so. Enough had been said by "Group VI—Metals and Metal Products."

The standardization of this classification into groups and subgroups by the Bureau of Labor Statistics is shown throughout the contents of Bulletin No. 920 [Pltf. Ex. 1]. On page 1, under the heading "Description and Use of BLS Primary Market Price Data" and a sub-heading "The Wholesale Price Index," appears the following:

"The primary market price data collected by the Bureau are used in making a number of price indexes, of which the most important is the wholesale price index. This index is based on prices of about 850 major commodities combined into 49 subgroups, 10 major groups, and 5 economic groups. All types of commodities, from raw materials to finished industrial and consumer goods, are represented. Indexes are published monthly for all groups and subgroups but weekly only for the 10 major groups and 5 economic groups. Because of differences in methods of calculation during earlier periods, the monthly and weekly indexes are not directly comparable as to level. * * *

* * * * *

“The relation of the value aggregate for each commodity expressed as a percentage of the value aggregate of all commodities in the index in 1946 is shown in table 12 under the heading ‘Relative importance, year 1946.’ The relative importance of each commodity in the index changes as the rate of price change varies among commodities, since it is based on the product of the quantity weighting factor and the current price. Thus, it may be different in the index for each period.”

The Bureau of Labor Statistics, hereinafter called the “Bureau,” through its Bulletin No. 920, at page 2, states:

“Certain commodities are included in more than 1 commodity group and these duplications must be kept in mind in using this procedure for calculating special indexes. Thus prices of 23 commodities are included in both the farm products and foods indexes, and prices of 23 *other commodities are included in both the metals and metal products and building materials groups*. The commodities so duplicated are listed in table 12 under the foods and building materials groups, with appropriate reference as to where price data are shown. These 46 commodities are counted only once in the all-commodities index. The relative importance figures shown in table 12 for the farm products and *metals and metal products groups and subgroups* include these duplicated commodities. The relative importance of the foods and building materials *groups and subgroups* do not include these duplicated commodities.” (Italics supplied.)

Near the bottom of page 3 of the Bulletin is a heading “Summary of Primary Market Price Movements, 1946,” following which are several headings, the sixth of which

is "Metals and Metal Products." At the top of page 9, in the half page of text following this heading, "Metals and Metal Products" are treated as a group.

On page 10, the Bureau, through its Bulletin No. 920, states:

"PRIMARY MARKET PRICES—INDEX NUMBERS,
BY GROUPS AND SUBGROUPS OF COMMODITIES

"Index numbers of primary market prices by groups and subgroups of commodities are shown for each month and the year 1946 in table 1, and for selected years in table 2. The commodities included in the groups 'Raw Materials,' 'Semimanufactured articles,' and 'Manufactured products' are listed on pages 8 and 9 of Wholesale Prices, 1944 (Bull. No. 870). *These indexes are published regularly in monthly mimeographed reports and in the Monthly Labor Review.*" (Italics supplied.)

On pages 11 and 12 of the Bulletin appears Table 1. At the top of the left-hand column of the table is the heading "Groups and subgroups." Opposite this heading appear index numbers for "All commodities" for each month during the year and the average for the year. These index numbers are separated by a *double black line* from the index numbers following below it. Next in the left-hand column are listed the ten groups with their subgroups, the sixth group being "Metals and Metal Products." The same is true in Table 2 on page 13 of the Bulletin.

In Bulletin No. 920 at page 25, in speaking of the revision of prices and index numbers for motor vehicles, the Bureau states that "Prices and indexes were carried back to 1913 *and were included as a subgroup of the metals and metal products group.*" (Italics supplied.)

Again, in Bulletin No. 920 at page 27, the Bureau refers to motor vehicles as a subgroup and says the revision mentioned

“affected several groups of the Bureau’s primary market price index. *Certain of the group indexes were in use for contract adjustments, and special indexes for the affected groups were calculated which continued to use the April 1942 prices.*” (Italics supplied.)

As shown, the classification is the same in all seven tables. In Bulletin No. 920, Table 12 is introduced on page 37, begins on page 38, and is more detailed than the other tables. On page 38 certain commodities are listed and their units stated with their average primary market prices for 1946 by months, and the yearly average in the last column. On the facing page (39) is a listing of the same commodities with their relative importance for the year, average index by months of primary market prices, and the average for the year. “Metals and Metal Products” is the sixth group in the table. This grouping is indicated by the larger black-face type for the ten major groups, with smaller black type for the subgroups, and regular type for each individual commodity. The index numbers for “All Commodities” are separated from the other index numbers by double black lines and the same type is used for it as is used for the subgroups. The “All Commodities” index is separate and apart from the groups. It represents the resulting index figures for all of the individual commodities *without duplication*.

There are 46 commodities which are used in more than one group. Twenty-three are included “in both the farm products and food indexes.” The prices of “23 other commodities are included in both the metals and metal

products and building materials groups.” But, “these 46 commodities are counted only once in the ‘all commodities’ index.” Their relative importance is shown only in one of the group [Pltf. Ex. 1—Bulletin No. 920, p. 2, quoted *supra*].

The point is that none of the 10 major groups is listed in the table as “one of the subgroups under ‘All Commodities.’” The District Court’s finding “That Metals and Metal Products as a group is, however, listed therein as one of the subgroups under ‘All Commodities’” [T. of R. p. 89] is not supported by any of the evidence whatsoever. The finding is erroneous and against all the evidence.

Further, the finding of the District Court “that said ‘Index Numbers of Individual Commodities’ does not contain any ‘Group VI’ as quoted in the price adjustment clause herein referred to” [T. of R. p. 89] is not supported by any of the evidence whatsoever. That finding is also erroneous and against all the evidence. The evidence all shows that there is a “Group” and that it is the “VI” group or sixth group in all of the tables and is referred to by the Bureau of Labor Statistics in each instance as a Group and that it is “Group VI—Metals and Metal Products,” as stated in the contract. [T. of R. p. 85.]

This is further shown by the column headed “Relative importance, year, 1946.” Opposite “All Commodities” is the figure 100. In this same column opposite the title of each of the “10 major groups” appear the figures 22.03, 20.49, 3.18, 8.65, 13.07, 13.32, 5.91, 1.68, 2.39 and 9.28, making a total of 100.

All ten groups together have the same total “Relative importance” as “All Commodities.” Both are based upon

all 850 individual commodities. There are duplications of commodities in the groups but no duplications in "All Commodities." This is just one more reason why none of the ten major groups are subgroups of "All Commodities," and that the only subgroups in the table are those under the groups, such as "Nonferrous metals."

The classification by the Bureau is further shown in Plaintiff's Exhibit 3, "Monthly Labor Review" for August, 1948, Volume 67, page 2, at page 155, in a portion of an article by S. Robert Mitchell, of the Bureau's Division of Prices and Cost of Living, entitled "Wholesale Price Index: Policy on Revisions and Corrections." The article continuously refers to "groups and subgroups"; the "metals and metal products group"; "four subgroups—motor vehicles, tires and tubes, furniture, and agricultural machinery and equipment"; "the published all-commodity index and the pertinent group index"; "the changing of the indexes for metals and metal products group by revision of the subgroup * * * motor vehicles"; "the all-commodity index"; "the effect of introducing the revised agricultural machinery and equipment subgroup sample into the calculation of the metals and metal products group and all-commodity indexes"; and on page 155 states:

"GENERAL DESCRIPTION OF THE INDEX.

"The Bureau of Labor Statistics has issued continuously since 1902 an official wholesale price index as an indicator of general price trends and average changes in commodity prices at primary market levels. The index was extended by the Bureau on a monthly basis, back to 1890, and annually as far back as 1749, by using data compiled in a number of special Government surveys and privately financed research pro-

ject. Separate monthly indexes are available for major groups of commodities from the year 1890, and for most of the subgroups from 1913.

“The Bureau’s wholesale price index thus provides one of the most comprehensive examples of a continuous economic series in the United States. It includes at the present time more than 850 individual commodities, which are classified into 10 major groups and 49 subgroups. These commodities are also combined into 5 special groupings for which separate indexes are issued—raw materials, semimanufactured articles, manufactured products, all commodities other than farm products, and all commodities other than farm products and foods. Current indexes are published regularly in the Current Labor Statistics department of the Monthly Labor Review.”

The foregoing shows conclusively that, according to the Bureau of Labor Statistics and to all those familiar with its treatment and classification of commodities in the tables, the sixth group is “Metals and Metal Products.”

There is no evidence to support the finding “that said Index Numbers of Individual Commodities’ does not contain any ‘Group VI,’ as quoted in the price adjustment clause herein referred to.” All of the evidence without conflict shows that there is a sixth group. To any informed reader “Group VI” means the sixth group, whether the Roman numeral itself actually appears in the table or not. When “Group VI” appears in the clause with “Metals and Metal Products” there can be no question as to the intent conveyed by a reading of the contract. It is not uncertain or ambiguous. It refers to the index figure for the group. As demonstrated the finding strikes from the contract the word and numeral “Group VI,” when the law requires that the words in the contract be given their usual meaning and that they not be ignored.

Definitions of the words “group” and “subgroup” are:

In Funk & Wagnall’s New Standard Dictionary, 1941, “group” is defined as follows:

“Group, n. 1. A number of persons or things existing or brought together with or without interrelation, orderly form or arrangement; and assemblage; a cluster, as a *group* of cottages; a *group* of facts.”

The term “sub” is a Latin word meaning “under, below.” (Black’s Law Dictionary [DeLuxe Third Edition, 1944]; Cyclopaedic Law Dictionary (2nd Ed., 1922).)

In *Durand v. Bethlehem Steel Co.* (Third Circuit), 122 F. 2d 321, at page 322, the court says:

“The prefix ‘sub’ signifies nothing more than that the term to which it is prefixed is present in only relatively small proportion or in less than the normal amount.”

All the evidence shows without conflict that the terms “all commodities,” “group” and “subgroup” have a fixed, well defined meaning.

“All Commodities” is something separate and apart from any one of or all of the ten major groups. It cannot properly be said that any one of the ten is a subgroup under “All Commodities.” “Groups” means any one of the ten major groups of commodities. These are not used to make up the “All Commodities” index figure, although the same individual commodities which are used in making up the ten major groups, with 46 duplications, are used without any duplication in making up the “All Commodities” index figure. The meaning of the term “subgroup” is illustrated by the statement that “nonferrous metals” is a subgroup of the “Metals and Metals Products” group.

5. The Evidence Shows Without Conflict That the Parties Intended That Adjustment for Increases in Material Costs Was to Be Made Upon the Group Index Rather Than Upon the Index Figures for Lead and Copper.

The Department clearly intended the use of the group index. There is no conflict in the evidence on this point. The Department's intent is shown by the testimony of Mr. Foster, Purchasing Agent of the Department and a witness for appellants. [T. of R. pp. 136 to 142.]

He stated that in an attempt to standardize in the use of price adjustment clauses, the Department had chosen this one and used it in the purchase of many varied types of products from 1941 to 1948. [T. of R. pp. 135-138.] Besides this and another contract with appellee, contracts were made with the General Electric Company and the General Cable Corporation and others. [T. of R. p. 137.] Contracts with this clause were made for the purchase of:

- Seamless carbon molybdenum pipe;
- Oil circuit breakers;
- Metal enclosed switch gear;
- Cast steel valves;
- Lead covered cable;
- Steam turbine electric generators; and other types of machinery.

Mr. Foster testified that this clause was used generally in all contracts for machinery and equipment of the nature listed above. [T. of R. p. 140.] The reason it was used by the Department was because it was impossible to buy material from anyone on a firm price basis. The clause was worked up primarily in the hopes that the Department

would not have too many adjustment clauses and it could use just one. It was picked because that *group* was used in a lot of materials and equipment that the Department purchased. It was thought that it would save the necessity of having different types of adjustment.

Mr. Foster said it was put in for two reasons: First, to be able to do business; and second, the adjustment clause was a protection to the parties. The Department was buying all sorts of electrical supplies and the main thing was, if prices went down the Department wanted the reduced price. The Department was not interested so much in the general uptrend of prices as in the trend in things it wanted. The adjustment clause was to favor electrical products.

Mr. Foster said the metal products Group VI was chosen for the purpose of reducing to the lowest possible number the price adjustment clauses the Department would have to use. There are a great many materials in that group and the Department thought, to take a group of that kind, it would reduce by a considerable number the price adjustment clauses which the Department would have to have. The length of delivery periods covered by these contracts covered from six months to two years or more.

Mr. Foster concluded, saying the Department had in mind that the component figure for many groups was a more conservative figure on which to adjust the price rather than the individual commodity. [T. of R. pp. 137 to 142.]

Clearly, the Department intended to use the group index and not the index for any individual commodity. It reduced the number of clauses to be used in its contracts; saved confusion, and made it easier for all to have just

one formula for electrical products manufactured primarily out of the metals in the chosen group.

There is no express language in the contract specifying the use of index numbers for lead and copper. In a previous portion of the argument appellants have demonstrated by underscoring the words which would have to be written into the contract to make the clause read in conformity with the District Court's findings. The clause is written so that only one index figure for each of the months involved is required to be found in order to calculate the price adjustment.

A further consideration of the Price Adjustment Clause seems desirable. It contains many provisions indicating that the parties did not intend to achieve complete price adjustment. The use of the group index is only one of these several features. The others are:

(1) The price was not to be increased in excess of the applicable *maximum OPA price* on delivery.

(2) Only *20 per cent* of the contract price was taken as representing labor costs.

(3) The contractor received the *average* increase in the index figure for labor costs without regard to the time of payment of wages.

(4) The Department was not to receive the benefit of labor decreases until the average monthly labor index figure fell below the *October, 1941*, index figure for a contract executed in 1946.

(5) The portion of the contract price representing material was fixed at 50 per cent.

This was not accurate. This 50 per cent, plus the 20 per cent labor, or 70 per cent, left 30 per cent of

the contract price without any provision for its adjustment.

(6) The contractor received the *average* increase in the index figure for material costs without regard to the time of purchase.

(7) The Department was not to receive the benefit of any material decreases unless the *average* material index figure was less than the index figure for October, 1941, in a contract executed in 1946.

(8) If shipment was delayed for specified reasons more than three months, the contractor had the *option* to base adjustment for both labor and material on the period from the date of the receipt of its bid to the date when *complete*, not partial, shipment was made.

(9) The percentage of increase or decrease was to be calculated to the *nearest* one-tenth of one per cent.

(10) The total price increase could not exceed 30 per cent of the original bid price.

Even though the cost of labor and materials and manufacturing had doubled, the price could be increased by only 30 per cent.

In the face of these *eleven* arbitrary features of the clause, appellee's contention and the Court's attempt in the findings for a full and complete adjustment of prices according to actual market prices falls down and is shown to be wholly without merit. The formula demonstrates in itself that it was not intended to accurately and fully adjust the price to all fluctuations of the market for either party.

The Court erred in making its finding that the language used in the Price Adjustment Clause was intended to and does refer to the index numbers of copper and lead and not to the "Metals and Metal Products" group for use in computing the increase in the contract price, and the Court erred in making its finding of the percentage of increase of the index numbers relating to copper and lead as stated in the findings. [T. of R. pp. 89 and 92.] This finding is against the expressly declared intent of the parties and is not supported by the evidence.

6. If the Contract Does Not Provide for Price Adjustment Based Upon the Group Index, There Is No Contract for Price Adjustment.

The District Court found that "the percentage of increase of index numbers relating to copper and lead * * * computed in accordance with the terms and provisions of said price adjustment clause were for the period from April, 1946 (the Base Month) to and including October, 1946 17.6%; and for the period from April, 1946 (the Base Month) to and including January 31, 1947 33.2%; for the period from April, 1946 (the Base Month) to and including the month of March, 1947 43.2%. That relating said percentage increases to the contract price as provided for in said price adjustment clause, the Court finds that plaintiff is entitled to a price increase in the amount of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars (\$9,996.69), in addition to all amounts heretofore paid by defendants to plaintiff."

The findings do not show how these percentages of increase were computed, although an understanding of the method of computation is absolutely indispensable to an appreciation of the true import of this finding.

The appellants have made the computations necessary to arrive at the percentage result found by the District Court, and a summary of these computations is set forth in Paragraph IV of appellants' answer. [T. of R. p. 18.] An outline of this method of computation may be stated as follows:

The three delivery periods involved are correctly stated in the finding quoted above as April, 1946, through October, 1946; April, 1946, through January, 1947; and April, 1946, through March, 1947. The monthly index figures for lead and copper were combined and averaged for each delivery period. From this average figure there was deducted the combined index figures (lead and copper) for April, 1946. This gave the number of points of increase for each delivery period, and from this the percentages stated by the Court were derived.

For example, the copper and lead index figures for April, 1946, combined, equalled 162.5. The lead and copper index figures for the months of April through October, 1946, combined for each month and averaged, were 191.1. Deducting 162.5 from 191.1 leaves 28.6, which is the number of points of increase for that delivery period. This number of points (28.6) is in turn 17.6% of 162.5. So 17.6% is the "percentage of increase," as found by the Court for this period. The percentages of increase for the other two delivery periods as found by the Court must have been, appellants submit, computed in the same manner.

In order to arrive at these percentages the Court *must*, in the computations, have given equal weight to the index figures for lead and for copper, respectively. In the light of the undisputed facts in this case, this is a fatal mistake

and is sufficient to demonstrate that the finding is arbitrary and capricious.

It must be remembered that the District Court refused to allow the price adjustment to rest upon the index figure for the "Metals and Metal Products" group constituting the average of some 140 metals and metal products, saying that such a construction of the contract would be "unrealistic." [T. of R. p. 77.]

What, then, did the Court do in an apparent attempt to be "realistic"?

First, the Court disregarded entirely some 10%, by value, of the materials involved in the contract [T. of R. p. 110.] These materials were largely paper and oil. By its finding, the Court, in effect, required that a price adjustment be made for these nonmetallic materials on the basis of an increase in the price of copper and lead. There is not a word of testimony in the record indicating that paper or oil, individually or in the aggregate, increased in any index numbers or in actual price in the open market by the percentages found by the Court.

Next, and even more important, is the Court's "unrealistic" weighting of the importance of copper and lead, respectively, in determining the proper percentage of increase.

The evidence shows, without dispute, that 385,144 pounds of lead was required for the contract, as against 108,130 pounds of copper. More important, in April, 1946 (the Base Month), the cost of the lead required for the contract was almost twice the cost of the copper re-

quired (\$25,034 for lead as against \$12,975 for copper). [Defts. Ex. B, Table IV.]

In the face of these facts, the Court made a finding of an applicable percentage of increase which could only be arrived at by assigning to each of these two commodities an equal weight.

We respectfully submit that such a finding is not, and cannot be, based upon the language of the contract or any evidence in this case, and is, in fact, completely arbitrary.

As a purported interpretation of the contract involved, the Court's findings become even more "unrealistic" when applied individually to the 6 different types of cable involved in the contract.

It must be borne in mind that the price adjustment clause to be interpreted in this case was a part of a set of specifications upon which bids were invited. Each of these 6 separate types of cable constituted a separate "item" upon which a bid might be submitted. A separate contract for each of the 6 types of cable might well have been awarded to different contractors. In each of these contracts this same price adjustment clause would necessarily appear.

In these six different types of cable, the ratio of copper to lead by weight varies widely as between types. At one extreme the ratio is copper 1 : lead 0.73. At the other extreme the ratio is copper 1 : lead 9.05. [Defts. Ex. C.] Yet under the Court's interpretation, the price adjustment under each of these contracts would be computed by assigning to each of the two metals a weight of 1 to 1.

In conclusion upon this point we refer to the findings of the District Court criticizing the use of the group index on the ground that it would "render the price adjustment clause unfair, unreasonable, inaccurate and speculative." [T. of R. pp. 92, 93.]

We respectfully submit that the formula hit upon by the District Court as a basis for price adjustment is itself demonstrably subject to criticism on each of these grounds. It disregards completely the price changes affecting 10 per cent of the materials involved and it distorts the monetary importance of the two principal commodities, lead and copper.

In electing to use the index numbers for the "Metals and Metal Products" group as the basis for price adjustment, it was not the expectation of the parties to the contract that this would result in a completely accurate price adjustment, with each of the component elements in the several types of cable properly weighted.

The Court has improperly refused to enforce the contract as written and has evolved a formula of its own; but this formula, in turn, fails to show accurately the changes in the price indexes of the commodities involved in this contract, giving to each commodity its proper weight. The Court's formula may equally be criticized as "unfair, unreasonable, inaccurate and speculative."

The Court's finding of percentages of increase is inconsistent with the agreed contract of the parties.

7. Assuming the Contract Is Ambiguous, the Conduct of Appellee in Presenting Six Invoices to Appellant for Price Adjustment for More Than Two-thirds of the Contract Price and Accepting Payment Therefor on the Basis of Index for "Metals and Metal Products" Group Is Entitled to Great Weight and Should Have Been Adopted and Enforced by the Court.

It is the duty of the court to give effect to the intention of the parties where it is not at variance with the correct legal interpretation of the contract and the practical construction placed by the parties on the instrument is the best evidence of their intention.

Universal Sales Corp. v. California Press Mfg. Co.,
20 Cal. 2d 751, at 761.

A contract is to be interpreted so as to give effect to the mutual lawful intention of the parties as it existed at the time of contracting.

California Civil Code, Sec. 1636.

Contemporaneous exposition is in general the best.

California Civil Code, Sec. 3535.

The construction of a contract may be shown by conduct of the parties in respect to uncertain terms where the meaning so determined is not unreasonable in view of the language used.

Doll v. Maravilas (1947), 82 Cal. App. 2d 943, at 949, 959, 187 P. 2d 885.

Defendants' Exhibit M consisted of six invoices sent by appellee to the Department dated December 23, 1946, December 31, 1946, February 11, 1947, and April 16, 1947, for price adjustment on cable shipped, for which the unadjusted contract price was \$61,053.35, plus taxes. In each invoice appellee computed the amount of increase thereon on account of increases in labor costs and the amount of increase on account of increases in material costs. Each computation for increases in material costs was made upon the group index for "Metals and Metal Products"—*not upon the index for lead and copper*. The Department paid the invoices as received and appellee accepted the payment. Mr. Metz testified that these invoices were sent out by appellee in the usual course of business and were paid by the Department in the same manner. [T. of R. pp. 129-130.] Mr. Metz said he did not see or hear of these invoices until after the contract had been fully performed, and then a formal invoice covering the whole contract was prepared, dated September 29, 1947, and submitted to the Department for the amount claimed in this action. This invoice was received in evidence as Plaintiff's Exhibit 2. [T. of R. pp. 130 to 133.]

The six invoices prepared in December, 1946, and February and April, 1947, prior to the completion of the contract were in accordance with appellants' construction of the contract that the group index was to be used, and as stated in the *Universal Sales Corporation* case, *supra*, is the best evidence of the parties' intention. Also, this interpretation is not at variance with the correct legal interpretation of the contract. It is the practical construc-

tion placed upon the contract by appellee and agreed to by appellants and contrary to the position which appellee now takes in this action.

This evidence does not support the Court's findings under attack here. As already argued none of the evidence which was competent and properly considered by the Court supports these findings. The findings in this regard are wholly unsupported by the evidence and they are clearly erroneous and the judgment based thereon should be reversed.

8. In This Action Against a Municipality, Interest Cannot Be Recovered Prior to Judgment Unless There Is Express Statutory Authority or Contract Therefor.

The contract [Defendants' Exhibit A] does not contain any provision for the payment of interest on any of the payments to be made under the contract. Neither is there any express statutory authority in the Charter of The City of Los Angeles or in the laws of the State of California for the recovery of interest prior to judgment in this action.

The leading case in California stating this rule of law is *Engebretson v. City of San Diego* (April, 1921), 185 Cal. 475, 197 Pac. 651. This was a suit for money due under contract, with interest from the date on which payments were due. The rule is fully stated and expressed on pages 479 and 480 of the opinion in the California Reports. Six earlier California cases are cited as supporting

the rule quoted by the court from Ruling Case Law (15 R. C. L., Sec. 14, p. 17). The theory upon which the rule is based is that whenever interest is allowed, either by statute or common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. This apparently favored position of the government in this respect has been declared to be demanded by public policy. The reasons for the rule apply with equal force to a municipal corporation. Sections 1915 and 1916 of the Civil Code regarding interest are held not to apply to the State or any of its subdivisions. The language is general and does not include the State or any of its political subdivisions, as the State is not bound by general words of a statute which would operate to establish a right of action against it. The court says there is no provision made for the payment of interest in the statute under which the action was brought by Ingebretson; nor was there any provision in the Charter of San Diego for the payment of interest on such claims.

The rule in the *Engebretson* case has been reaffirmed by the Supreme Court and the District Court of Appeal of the State of California in the following cases:

Los Angeles Dredging Co. v. City of Long Beach
(1930), 210 Cal. 348, 291 Pac. 839;

Reclamation District No. 1500 v. Reclamation Board (Nov. 1925), 197 Cal. 482, 241 Pac. 552;

McNutt v. City of Los Angeles (Oct. 1921), 187 Cal. 245, 201 Pac. 592;

Connecticut General Life Insurance Co. v. State of California (Oct. 1941), 47 Cal. App. 2d 88.

As previously stated in this brief, the case at bar was brought in the District Court on the ground of diversity of citizenship and is governed by the law of the State of California. The foregoing cases, together with the cases cited in the opinions, fully support appellants' contention that in California interest cannot be recovered prior to judgment in this action against a municipality, there being no express statutory authority or contractual provision for recovery of interest.

Accordingly, it was error for the Court to allow recovery of interest in this case. In Finding No. 15 the words "together with interest thereon at the rate of seven per cent (7%) per annum from the first day of May, 1947," should be stricken. [T. of R. p. 92.]

In Conclusion of Law No. 4 the words "with interest thereon at the rate of seven per cent (7%) per annum from the first day of May, 1947, to the date of judgment herein" should be stricken. [T. of R. p. 94.]

In the Judgment the words "together with interest thereon at the rate of seven per cent (7%) per annum from the first day of May, 1947, to the date hereof in the amount of \$1,306.21," should be stricken. [T. of R. p. 96.]

Conclusion.

Appellants respectfully submit that the judgment of the District Court should be reversed for the reason that its findings that the lead and copper indexes were intended to be used are clearly erroneous, unsupported by any competent evidence, and a consideration of the entire evidence leaves a definite and firm conviction that a mistake has been committed by the District Court; and that in any event, interest is not recoverable prior to judgment in this action against a municipality.

Respectfully submitted,

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No. 12337.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF
LOS ANGELES, THE CITY OF LOS ANGELES, a municipal
corporation,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Appellee.

APPELLEE'S REPLY BRIEF.

FILED

JAN 6 - 1950

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No. 12337.

IN THE

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FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF
LOS ANGELES, THE CITY OF LOS ANGELES, a municipal
corporation,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Appellee.

APPELLEE'S REPLY BRIEF.

Basic Question Presented on This Appeal.

Where a price adjustment clause contained in a contract for the manufacture and sale of electrical power cable, composed principally of copper and lead (and containing no other metals), provides for an adjustment of the price based on United States Labor Bureau data, did the trial court properly determine that changes in the prices of lead and copper were to be referred to, rather than to changes in the average index figures of 141 commodities included under a heading Metal and Metal Products, where a reference to lead and copper renders the price adjustment clause fair, just and reasonable while a reference to Metal and Metal Products as a group would render the contract unreasonable, inaccurate, speculative and unfair?

I.

STATEMENT OF PLEADINGS.

The Complaint.

Appellee (plaintiff below) The Okonite-Callender Cable Company, Incorporated, filed its Complaint against Appellants, Department of Water and Power of the City of Los Angeles and the City of Los Angeles (defendants below) for money due on a contract for the manufacture and sale of six items of power cable, the principal components of which were copper and lead.

After alleging the jurisdictional requirements as to diversity and amount, the items of cable involved in the contract and the price for the separate items, the Complaint referred to the price adjustment clause contained in the contract and to the United States Department of Labor monthly compilations of wholesale prices referred to in the price adjustment clause. The Complaint in Paragraph IX thereof [T. of R. p. 5] (a short paragraph of seventeen lines in the Transcript of Record) alleged that during the period of said contract and before completion thereof increases occurred in the cost of labor and materials; that the two principal materials used in the manufacture of said cable were copper and lead and that the average increase in the monthly index figures referred to in said contract and compiled by the United States Department of Labor for copper and lead for the period in question were as therein set out. It was thereafter alleged that plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price because of the materials used in said cable [Par. X of the Complaint; T. of R. p. 6]. That prior

to the commencement of the action plaintiff filed a claim as required by law against the defendants; that defendants allowed said claim in part only; that plaintiff had duly performed all of the terms and conditions of said contract on its part to be performed [T. of R. p. 7]; that said partial allowance constituted a part only of the increased contract price occasioned by the increase of the cost of copper and lead used in the manufacture of said cable, as evidenced by the Department of Labor Index [Par. XIII of the Complaint; T. of R. p. 7]. That pursuant to the price adjustment clause in said contract, plaintiff, after allowing a credit for the amounts paid by the defendants, was entitled to recover the sum of \$9,-996.90 with interest thereon at the rate of 7% per annum from the 1st day of March, 1947, until paid [Par. XIV of said Complaint; T. of R. pp. 7-8]. The Complaint consisting of seven pages is set out in the Transcript of Record, pages 2-8, inclusive.

The Answer.

The Answer [T. of R. pp. 9-25, incl.] refers to the same six items of cable covered by the contract and the contract price per item and in addition to the allegations in the Complaint the Answer sets out in tabulated form the beginning and completion dates. Paragraph III of the Answer [T. of R. p. 11] sets out in quotation marks the price adjustment clause contained in the contract. After the introductory paragraph the clause first deals with the adjustment of the contract price upwards or downwards for changes in labor costs, stating that "for the purpose of adjustment the proportion of the contract price is accepted as 20%." The second portion of the price adjust-

ment clause deals with material and states that “for the purpose of adjustment the proportion of the contract price representing material is accepted as 50%” [T. of R. p. 12]. Clause (b) dealing with the adjustment in the material costs gave rise to the only controversy in the Court below. (This clause will be quoted and discussed under the Argument Section of this brief.)

Paragraph IV of the Answer [T. of R. pp. 15-18, incl.] purporting to be an answer to Paragraph IX of the Complaint hereinbefore referred to contains throughout the phrase “that the defendants admit and allege.” A careful examination of this paragraph of the Answer shows that everything in Paragraph IX of plaintiff’s Complaint is admitted but much additional detailed matter is alleged in said Paragraph IV of the Answer. For example, the defendants admit that lead and copper constitute a large proportion of the material used in the manufacture of said cable [T. of R. p. 15, at bottom of page]. The Answer then refers to the various groups of materials contained in the Bureau of Labor publication and while plaintiff’s Complaint did not refer to “Metal and Metal Products” or the particular commodities included thereunder either in Paragraph IX or elsewhere in the Complaint, the Answer alleges that Metal and Metal Products is the sixth group of index numbers of wholesale prices, and thereafter defendants “admit and allege” that there are sixteen commodities listed under Metal and Metal Products including Copper, Electrolytic, delivered Connecticut Valley, and Lead, Pig, Desilverized, f. o. b. New York [T. of R. bottom of page 16, top of page 17]. The defendants then “admit and allege” that for the period from April, 1946, to March of 1947, inclusive, the United States

Department of Labor, Bureau of Labor Statistics, published the index numbers of the wholesale prices of "Copper, Electrolytic, delivered Connecticut Valley," and "Lead, Pig, Desilverized, f. o. b. New York, as hereinafter set forth under Columns 1, 2 and 3, respectively." That the sum of two index numbers for each of said months, respectively, is the amount hereinafter set forth under Column 4. That the average amount of the two index figures for the period from the base month of April, 1946, to and including each of the several months specified in the contract for final shipment and the increase of said average amounts of said base month and the respective percentage of increase of each of said average figures over said base month are set forth under Columns 5, 6 and 7.

Thereafter in tabulated form the Answer sets forth under seven numbered columns (1) the month; (2) the index number of copper for each of said months; (3) the index number of lead for each of said months; (4) the total horizontally of Columns 2 and 3; (5) the average for each of the three delivery periods; (6) the increase in points for the delivery periods; and (7) the percentage of increase. It is to be noted that the figures set forth under Columns 6 and 7 [T. of R. p. 18] are identical with the figures set forth in Paragraph IX_i of plaintiff's Complaint [T. of R. p. 6]. Thereafter the Answer admits that the plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price.

The Answer then refers to the claim filed by the plaintiff prior to the commencement of suit, the amount allowed by the defendants and the balance rejected “without prejudice” either to plaintiff or to the defendants and admits that plaintiff has duly performed all of the conditions of said contract on its part to be performed. The Answer then alleges that defendants have paid all that is due and owing [T. of R. pp. 19-20].

The Answer [T. of R. pp. 22-23] then sets forth in tabulated form index numbers taken from the Metal and Metal Products group for the months in question stating the average increase and the percentage increase. We call the Court’s attention to the fact that this tabulation is in the same general form as set out in the Answer covering lead and copper [T. of R. p. 18] the difference being that since the tabulation on page 18 covers copper and lead the *defendants have averaged* copper and lead and thus obtained the percentages of increase claimed in plaintiff’s Complaint. Finally the Answer sets out in tabulated form the method of translating the percentage increases into dollars under the defendants’ theory of the proper method of computation. Defendants allege that no additional money is due or unpaid.

The Answer set up no affirmative defenses but, as seen, went far beyond mere admissions and denials of the plaintiff’s Complaint and set forth the exact alternative method of computation to be adopted by the Court depending upon whether the Court adopted plaintiff’s construction of the price adjustment clause or defendants’ construction.

II.

STATEMENT OF THE CASE.

Appellants' statement of the case (App. Op. Br. pp. 2-5, incl.), as to factual statements, appears to be correct so far as it goes. We wish to make certain additional statements, however, which have a bearing upon certain points advanced for the first time on this appeal by Appellants in seeking a reversal of the Findings and Judgment below. Appellee (plaintiff below) pursuant to local Federal Rule 12 filed with the Court a written pre-trial Memorandum of Points and Authorities [T. of R. pp. 26-66]. Defendants likewise simultaneously filed a Memorandum prior to trial [T. of R. pp. 67-75]. Plaintiff's pre-trial memorandum after referring to the action and the amount sought to be recovered, stated:

"The only issue between the plaintiff and the defendants is as to the correct interpretation of the price adjustment clause as applied to certain monthly statistical information published by the United States Department of Labor. There is no controversy as to the publications themselves. The issue is a narrow one and resolves itself into which set of data contained in the Bureau of Labor publications is to be used in computing the increased price of materials under the price adjustment clause of the contract."
[T. of R. p. 27.]

Immediately following the foregoing statement, plaintiff's pre-trial memorandum contained the following statement:

"The defendants agree with the plaintiff that if plaintiff's construction of the escalator clause as applied to the Bureau of Labor Statistics is correct, that plaintiff is entitled to recover the sum of \$9,996.69 with interest. (Only 21¢ less than plaintiff

claims in its Complaint, which slight amount plaintiff is, of course, willing to waive.) Plaintiff and defendants are likewise in agreement that if defendants' construction of the price adjustment clause as applied to the monthly Bureau of Labor data is correct, that plaintiff is not entitled to recover in any amount whatsoever." [T. of R. p. 27.]

See also similar statement in plaintiff's pre-trial memorandum [T. of R. p. 43].

Plaintiff's pre-trial memorandum dealt in considerable detail with an explanation of the Bureau of Labor Statistics [T. of R. pp. 36 to 45] in an effort to explain to the trial court the statistics in question, the individual commodities, 141 in number, including lead and copper which were listed under the group of Metal and Metal Products.

Plaintiff's pre-trial memorandum then presented plaintiff's argument and authorities.

Defendants' memorandum prior to trial [T. of R. pp. 67-75] is prefaced by a statement of facts wherein it is stated:

"Issue is joined on the proper interpretation of the contract provisions regarding the adjustment in the contract price for increases in material costs." [T. of R. p. 68.]

Defendants' Points and Authorities are set out in its memorandum prior to trial [T. of R. pp. 72-75].

After the trial of the case, the learned trial Judge, the Honorable Leon R. Yankwich, filed a decision ordering judgment for the amount prayed for \$9,996.69 with interest at 7% from March 1, 1947. The deduction of 21¢

which plaintiff was willing to waive arose because defendants' accountants in computing the increased cost differed by that amount from plaintiff's computation and the amount prayed for in the Complaint. The informal decision of the Court, the comments with respect thereto and the instructions that plaintiff prepare Findings and Judgment in conformity with local Rule 7 appears in T. of R. pages 76-78.

Detailed Findings of Fact, Conclusions of Law and Judgment will be found in the T. of R. pages 78-96. In Finding No. 6 [T. of R. p. 82] the Court found:

“The controversy herein relates only to the price adjustment clause dealing with the increased costs of materials used by plaintiff in the manufacture of said cable.”

The Findings set out in full the price adjustment clause [T. of R. pp. 83-87]. The Court found that the Bureau of Labor Statistics introduced in evidence were the ones referred to in said contract and that a publication known as the “Labor Review” containing many written articles and a month later reprint of certain group index numbers, including Metal and Metal Products, was not the publication intended to be referred to by the price adjustment clause. The findings further state

“the parties plainly intended to disregard all non-metallic components contained in said cable. The sole metallic components of said cable are lead and copper and the Court finds that whenever said price

adjustment clause in said contract refers to 'material' or 'increases in material costs' or 'decreases in material costs' or similar words or phrases, the word 'material' or 'materials' refers to copper, electrolytic, delivered Connecticut Valley, and lead, pig, desilverized, f. o. b. New York, which are the principal component parts of the cable referred to in said contract." [T. of R. p. 91.]

The Court likewise found that the excess costs of said materials to the plaintiff "was substantially more than the amount which plaintiff seeks to recover herein by virtue of said price adjustment clause" [T. of R. p. 88]. The Court found that the construction of the price adjustment clause of said contract contended for by defendants "would render such price adjustment clause unfair, unreasonable, inaccurate and speculative." On the other hand, that the construction of the price adjustment clause contended for by the plaintiff and found by the Court to be the correct construction "renders said clause reasonable, fair and definite and is the only construction which the parties as reasonable business men could have had in contemplation at the time when said contract was entered into" [T. of R. p. 93]. And, finally, that any allegations in the Answer in conflict with the Findings of the Court were not true or correct [T. of R. p. 93].

Conclusions of Law follow, again stating the amount of the judgment as \$9,996.69 with interest at 7% from May 1, 1947, to the date of judgment. The Judgment is set out in the Transcript of Record at page 95. Pur-

suant to the Findings, interest in the amount of \$1,306.21 was added to the principal amount of \$9,996.69.

After plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment were served upon the defendants, defendants filed elaborate objections in great detail to the proposed Findings and Judgment. Said objections to plaintiff's proposed Findings of Fact and Conclusions of Law were, Appellee believes, the only documents filed with the trial court which the Appellants expressly excluded from the official certified record [See Appellants' designation of record on appeal, T. of R. p. 100 and top of p. 101]. Consequently, said objections to plaintiff's proposed Findings of Fact and Conclusions of Law do not, Appellee assumes, appear even in the certified official transcript and, of course, are not printed in the transcript of record.

After the entry of the Judgment on March 15, 1949 [T. of R. p. 98] the defendants moved for a new trial, to set aside Findings of Fact, Conclusions of Law and to vacate and set aside the Judgment, all of which motions were denied.

III.

SUMMARY OF ARGUMENT.

The subject matter of the contract, electrical cable, is composed chiefly of copper and lead, its only metallic components. The wording of the price adjustment clause itself, giving consideration to all of its terms including the phrase "increases in material costs" and similar phrases clearly referring to lead and copper requires that reference be made to the changes in the prices of copper and lead as disclosed by the Bureau of Labor Statistics referred to in the clause.

The testimony of Appellants' own chief witness clearly discloses that the price adjustment clause was intended to take care of increases or decreases in the cost of the materials used in the manufacture of the cable.

The data with respect to lead and copper are contained in the Bureau of Labor price publications and accurately represent the increases in material costs to the manufacturer. The average change in the group of Metal and Metal Products as a whole, consisting of approximately 140 separate commodities, completely fails to represent such increase.

It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted.

While the Findings of the trial court are not *per se* binding upon the Appellate Court, they are presumptively

correct and will not be disturbed unless this Court is satisfied that they are clearly erroneous and "inconsistent with substantial justice."

The testimony of Mr. Metz, a witness for Appellee, was material and relevant and properly admitted by the Court.

Interest was properly allowed covering the period when payments became due until the entry of judgment. The Department of Water and Power of the City of Los Angeles was acting in a private or proprietary capacity and its obligations are identical to those of a private corporation.

ARGUMENT.

IV.

THE CONSTRUCTION PLACED UPON THE PRICE ADJUSTMENT CLAUSE BY THE TRIAL COURT IS THE ONLY CONSTRUCTION PERMISSIBLE IN VIEW OF (1) THE SUBJECT MATTER OF THE CONTRACT; (2) THE TERMS AND PROVISIONS OF THE PRICE ADJUSTMENT CLAUSE; (3) THE UNITED STATES DEPARTMENT OF LABOR DATA REFERRED TO UNDER THE PRICE ADJUSTMENT CLAUSE; (4) THE TESTIMONY OF APPELLANTS' OWN CHIEF WITNESS RELATING TO THE PURPOSE SOUGHT TO BE ACCOMPLISHED BY THE PRICE ADJUSTMENT CLAUSE.

1. The Subject Matter of the Contract.

As disclosed by the pleadings, the contract covering six items of electrical power cable was awarded Appellee pursuant to Appellants' request for bids. Typical samples of the identical six types of cable are before this Court as exhibits in the case. An examination of these samples shows that the cable consists of an outer sheathing of lead with an inner core of copper wires formed into copper cables of different sizes and dimensions in the different cables. Some insulating material consisting of paper and oil as required by the contract specifications are the only other materials in the cable. The Complaint alleged that the two principal materials used in the manufacture of said cable were copper and lead [Plaintiff's Complaint; T. of R. p. 5, bottom of page]. Defendants' Answer to this allegation was "defendants admit that lead and copper constitute a large proportion of the ma-

materials used in the manufacture of said cable" [T. of R. bottom of p. 15]. Plaintiff's witness, Mr. Metz, testified that the cost of copper and lead was 90 per cent of the cost of all material used in the cable [T. of R. p. 110]. Subsequent testimony discloses that in giving this percentage he was referring to the average of all six different items in the cable. Appellants' (defendants below) witness, Boris A. Gray, gave the cost percentage as varying from 84.67% to 97.10% with a general average of all as 91.33% [T. of R. p. 147]. The Court in its Memorandum Decision mentions 90% as to this cost and the formal Findings state: "That the cost of the lead and copper used in the manufacture of all said items of cable as a group amounted to slightly in excess of ninety per cent (90%) of the total cost of all material used in said cable" [T. of R. p. 88].

The Court found that the parties intended to disregard the insulating material in the cable since no such commodity was included under the Bureau of Labor publications dealing with Metal and Metal Products. Mr. Metz, plaintiff's witness, testified that copper, Commodity Code No. 472.1, and lead, Commodity Code No. 473, in the Bureau of Labor Statistics, met and complied with the specifications of the contract. Thus at the outset we have the subject matter of the contract composed chiefly of lead and copper and we find that lead and copper meeting the specifications of the contract are among the commodities under Metal and Metal Products and that their monthly prices are given and that index numbers with respect to such commodities are available, all as admitted and set forth in Appellants' Answer [T. of R. p. 18]. In view of these circumstances it would be unusual, to

say the least, that the parties should provide under a price adjustment clause that increased or decreased material costs would be measured by taking the average increases or decreases of the entire group of Metal and Metal Products. Metal and Metal Products contain approximately 141 separate commodities, 111 of which are strictly manufactured articles, including such commodities as all types of farm machinery and equipment (even including windmills), automobiles and trucks; fabricated and unfabricated articles of iron and steel; plumbing material and fixtures, including vitreous china articles and all those various types of commodities which are listed under Metal and Metal Products in the United States Bureau of Labor publications.

Moreover, to refer to Metal and Metal Products as a group would clearly make the contract speculative and entirely unreasonable. Thus the prices of the actual component materials (lead and copper) might well have decreased (as did quicksilver, for example) despite the fact that Metal and Metal Products *as a group* increased. Under such circumstances, the application of Appellants' theory would achieve the absurd result that despite the fact that the manufacturer's material costs had decreased, the purchaser (Appellants) would be required to pay large additional amounts merely because of the increase in the Metal and Metal Products group as a whole. This was undoubtedly what the trial court referred to in its comments in its Memorandum Decision when he said that to make the price dependent upon the average of some 140 commodities listed by the Department of Labor would be unrealistic and that the only reasonable interpretation of the clause is one which would make the price

adjustment dependent upon the cost of the component *materials* of the cable as found in Metal and Metal Products [See T. of R. p. 76 where the exact comments of the learned trial judge are given]. As was noted by one of plaintiff's counsel on seeing samples of this cable: "I am unable to see any automobiles, windmills or bathtubs in this cable." Yet Appellants' theory would require that fluctuations in just such items would control the price adjustment clause now before this Court.

2. The Terms and Provisions of the Price Adjustment Clause.

For the convenience of the Court we quote the introductory provisions of the price adjustment clause and immediately thereafter the portion of the price adjustment clause dealing with materials (emphasis added):

"1.3 Price Adjustment Clause: The contract price shall be subject to adjustment for *changes in labor and/or material costs*, such adjustments to be determined in accordance with the following method, provided however, that the price shall not be increased by virtue of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942. * * *

"2. Material:

"a. For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

"b. The above amount accepted as representing *material* will be adjusted for *increases in material costs*, such adjustment to be based on the index of *wholesale prices* for 'Group VI—Metals and Metal

Products' compiled monthly by the U. S. Department of Labor. The average of the monthly *material index figures* for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly *material index figure* with the *material index figure* for the Base Month. The adjustment for increases in *material* will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing *material*, as indicated above, and the result will be accepted as an increase in the contract price." (Emphasis added.) [T. of R. pp. 83-84-85-86.]

We have emphasized certain words and phrases in these two clauses to which we desire particularly to call attention. We believe that an examination of these clauses alone, giving due consideration to the various phrases and words used therein, will, independent of all other circumstances, more than justify the interpretation of the price adjustment placed upon it by the trial court.

At the outset we call attention to the phrase in the preliminary portion quoted "changes in labor and/or material costs." When we come to the portion of the clause expressly dealing with material we find the repeated use of the words "material" and "increases in material costs." The words "material" and "material costs" must have been intended to refer to the principal materials used in the manufacture of the cable. While the clause itself is not artfully drawn, its meaning is clear. The prefix "Group VI" which is a part of the phrase "Group VI—Metal and Metal Products," all of which is in quotations in the price adjustment clause itself, nowhere appears

in the United States Department of Labor compilations in connection with the Metal and Metal Products group of 141 separate commodities. Consequently, we are safe in saying that the term "Group VI—Metal and Metal Products" is not a term of art.

Next, it should be noted that before the quoted words "Group VI—Metal and Metal Products" the words "wholesale prices" appear, but there are *no* wholesale *prices* given for Metal and Metal Products as a group. Obviously no single price could be assigned to 141 different products, for no direct comparison can be made between lead and copper selling for a few cents a pound and automobiles, trucks, farm machinery and all of the various other items under the group.

The next sentence in the clause taken with the words "the average of the monthly *material* index figures" is wholly inconsistent with Metal and Metal Products as a group. The draftsman of the clause, if it was intended to refer to the group as a whole, would have referred back to the index numbers of Metal and Metal Products as a group and would not have referred to monthly *material* index figures since "material" can only refer to the material in the cable. This same use as we have stated of the words "material index figure," and "material index figure for the base month," can only reasonably refer to lead and copper, the principal (and only metallic) components of the cable. In the following clause (c) [T. of R. p. 34] the words "monthly material index figure" and "material index figure" are used several times without any reference whatsoever to Metal and Metal Products with or without the prefix "Group VI." Likewise, under the general provisions [Paragraph 1, T. of R. p. 34] we

find the words "material costs." A later provision of the price adjustment clause [T. of R. p. 35] provides that in determining the adjustment in contract price the percentage of increase or decrease in labor and *material costs* will be calculated to the nearest 1/10th of 1%. The requirement of such a high degree of accuracy would indeed be strange if thousands of dollars' costs with respect to material are to be added to or subtracted from the contract price merely because of the increase or decrease of index numbers relating to Metal and Metal Products as a group as distinct from the component parts of the material furnished under the contract. We cannot believe that the Appellants were entering into such a gambling contract.

Appellants concede in their Opening Brief, as they must concede, that it was impossible for the Department to buy material from anyone on a firm basis (App. Op. Br. p. 35, bottom of page). Appellants also state by way of excuse for their construction of the price adjustment clause that it was clear that the parties did not intend to achieve complete price adjustment (App. Op. Br. p. 38). And again with respect to their own contention Appellants' Opening Brief states:

"The formula demonstrates in itself that it was not intended to accurately and fully adjust the price to all fluctuations of the market for either party."
(App. Op. Br. p. 38.)

Appellants are bound to concede that they are obliged to give up prefix "Group VI" since no such prefix is assigned to Metal and Metal Products in the United States Department of Labor publications. Nevertheless appellants feel obliged to hold on to the word "Group" as well

as to translate a Roman VI into an Arabic 6 by an elaborate and, we think, fruitless argument under Section 4 of Appellants' Opening Brief, pages 25 to 34.

We wish to call the Court's attention to another very important later paragraph in the price adjustment clause which, we think, conclusively shows that Appellants' construction of the main price adjustment clause relating to materials is wholly unsound.

Clause (c) of the price adjustment clause provides:

"If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the selection of substitute indices will be made by mutual agreement of the parties to this contract." [T. of R. p. 87.]

It is inconceivable that any other price data grouping 141 separate commodities under Metal and Metal Products group would be available if the United States Department of Labor publications were not continued. We think under those circumstances it would be impossible for the parties by mutual agreement to agree on any other data except that which referred to the increased or decreased costs of the principal *materials* in the cable. The prices of lead and copper would always be available. Lead and copper are probably the two most important metals, with the possible exception of iron, used in manufacturing. It must be apparent therefore that the Court's construction and application of the price adjustment clause was abundantly justified and we would say required by the internal evidence available from an examination of the price adjustment clause.

By specific agreement the clause provides for a separate adjustment with respect to increase or decrease in labor costs. If now, as Appellants contend, we are to go back to the average price translated into index numbers of 141 commodities or articles, 110 of which are strictly manufactured, we again throw labor back into the price adjustment clause with respect to materials. The parties by agreement having expressly taken it out, Appellants now wish by indirection and contrary to all reason to return it as a factor in determining increases or decreases in material costs.

We have pointed out that on Appellants' theory, Appellants would be obliged to pay out large additional amounts under the price adjustment clause if the index numbers of Metal and Metal Products as a group advanced, while lead and copper did not. Appellee (plaintiff below) in its pre-trial Points and Authorities, pursuant to local Rule 12, referred as an illustration to quicksilver listed close to lead and copper under the non-ferrous subgroup under Metal and Metal Products. Quicksilver carried a price in April (the base month of the contract) of \$104.50 per 76 pound flask and steadily declined in price until December of that year the price was \$88.37½ [see page 86 of Bulletin No. 920—upper half of the table—Pltf. Ex. 1]. If this contract, therefore, had specified a product largely composed of mercury the manufacturer's costs would have drastically decreased and yet—under Appellants' construction of the price adjustment clause—the manufacturer on a contract of the size of the one here involved could have collected in the neighborhood of \$15,000 as additional compensation because of the advance in the Metal and Metal Products group as a whole.

It cannot be assumed that Appellants, the Department of Water and Power and the City of Los Angeles were

playing roulette with their funds, nor can it be assumed that a manufacturer who was refusing to make firm bids would, in turn, be willing to enter into such a speculative contract. It is readily seen, therefore, why the learned trial Judge felt that it was unrealistic to tie the price adjustment clause into and make it dependent upon the average of some 140 metal commodities. The only assumption possible in approaching an interpretation of this price adjustment clause is that it was for the legitimate purpose of fairly and with reasonable accuracy adjusting the contract price depending upon increases or decreases in the cost of materials contained in the cable.

We now come to Appellants' detailed argument with respect to whether Metal and Metal Products is Group 6 or Group 7 and its discussion of when a group is a group or a subgroup. This portion of Appellants' Opening Brief (pp. 25-34) is obviously an attempt to answer comments contained in the informal opinion of the learned trial Judge below.

The Findings and Judgment do not purport to determine whether Metal and Metal Products is the sixth group in the list or the seventh group, or is a main group or a sub-group, but an examination of the Bureau of Labor publications [Pltf. Ex. 1, Table I, p. 11] demonstrates that even in his offhand comments and in his discussion with Appellants' counsel at the trial that the Court and not Appellants' counsel was correct and that Metal and Metal Products is the seventh group. But the Findings and Judgment of the Court turned on no such narrow point. Appellants' Opening Brief (pp. 25-34) dealing with what is a group or a subgroup or whether "all commodities" was or was not a group seems to Appellee wholly immaterial and beside the point. As stated, "Group VI—Metal and Metal Products" was not a phrase

of art since the prefix "Group VI" does not appear in the Bureau of Labor Publications and, therefore, the trial court was obliged to interpret the price adjustment clause in such a way as he believed carried out the true intentions of the parties, giving proper consideration to the entire contract.

The entire controversy in the Court below was as to whether the price adjustment clause reasonably construed required a reference to the changes in material costs with respect to copper and lead or whether it required the taking of the average change in the index numbers relating solely to the entire group of Metal and Metal Products. We believe that the trial court's construction of this clause was the only one reasonably available considering the terms and provisions of the clause and the subject matter of the contract.

Beginning at pages 37-38 of Appellants' Opening Brief, Appellants mention what they term "arbitrary features" of the price adjustment clause which Appellants claim indicated the parties "did not intend to achieve complete price adjustment." We do not know why it should be assumed that the parties would not wish to achieve at least a reasonably accurate price adjustment. An examination of the eleven so-called "arbitrary features" give no weight to Appellants' argument. The requirement that deliveries comply with OPA prices was obviously to insure the legality of the delivery price. There is not the slightest evidence in the record that 20% agreed upon by the parties as representing labor and 50% as representing material in connection with the price adjustment was not accurate and reasonable. The remaining 30% would obviously cover costs, other than direct labor and material costs, including such items as overhead, capital in-

vestment and other matters which the parties were willing to assume would not greatly fluctuate during the life of the contract. There is nothing in the record with respect to the October, 1941, index numbers which were to be applied in computing decreases in the contract price. The provision that the total price increase should not exceed 30% of the original bid price is a usual and customary limitation upon price adjustment or escalator clauses and does not in the slightest indicate that reasonably accurate adjustments should not be made up to that percentage. The provision that the average monthly increases in labor costs and the average monthly increases in material costs be taken in place of taking the actual date of the payment of labor and material and the purchase of material was reasonably accurate. The saving in bookkeeping expense alone and a possible controversy over minor matters would more than justify such provisions. Lastly, Appellants state that since the percentage of increase or decrease was to be calculated to the nearest 1/10th of 1% it was an indication that the parties did not intend to achieve complete price adjustment. Not carrying the computation beyond 1/10th of 1% would at most, if the dropping of figures were all in error on one side, not exceed \$1.00 in \$1,000, and this can scarcely be used as an argument intended to justify an overpayment or underpayment of thousands of dollars which has no reference to actual increased or decreased costs of material.

We may also here state that the deduction of 21¢ (the difference between the amount prayed for in plaintiff's Complaint and the amount of the judgment) represented the only difference between plaintiffs calculation and the calculation made before the trial by *Appellants' own auditors*, presumably carried out to 1/10th of 1%.

3. United States Bureau of Labor Price Publications.

The Court found that a reasonable construction of the price adjustment clause required a reference to the increase in prices of lead and copper, two of the metals listed under Metal and Metal Products as shown in the Department of Labor monthly bulletins labeled "Average Wholesale Prices and Index Numbers of Individual Commodities."

In plaintiff's (Appellee here) pre-trial memorandum plaintiff went into a detailed analysis and explanation of the Bureau of Labor monthly publications referred to in the price adjustment clause [see T. of R. pp. 36-45]. This explanation attempted to show the way the publications were set up and how they dealt with individual commodity items, such as copper and lead, with their respective code numbers and the grouping of the individual commodities into various groups and sub-groups. If the explanation as set forth in Appellants' Opening Brief and as in Appellee's Reply Brief are not sufficient, we respectfully refer the Court to the Transcript of Record, pp. 36-45.

Appellants in their Opening Brief from pages 25 to 34 discuss and quote various portions of Bulletin No. 920 [Pltf. Ex. 1]. The portions quoted as well as additional matter referred to in the opening introductory clauses of said Bulletin show that the Bureau of Labor itself admits that the index numbers assigned to Metal and Metal Products as a group are subject to important inaccuracies due to the change in the method of handling automobiles which carried a heavy weight in computing the index numbers. Furthermore as the quotations and the Bulle-

tin show [see pp. 2 and 3 of Bulletin No. 920—Pltf. Ex. 1] quoted from T. of R. p. 56, the Bulletin states that 23 commodities are included in both the farm and food indices, and prices of 23 other commodities are included in both the Metal and Metal Products and building material groups. As elsewhere stated, the only *actual and accurate prices* given in the Bulletin are in respect to the individual commodities. Any grouping of these individual commodities can be made and is, of course, more or less arbitrary. Such grouping of these commodities, therefore, gives only statistical information with respect to the general increase in prices or decrease in prices on the average of all of the commodities under the particular group.

Out of the 141 individual commodities or articles listed under Metal and Metal Products, for which individual prices are given in the upper half of Table 12 (49) and index numbers in the lower half of Table 12, approximately 110 of these commodities or articles are manufactured. For example, all of the commodities listed under the agricultural implements and farm machinery, the first subdivision under Metal and Metal Products, are strictly manufactured articles. Of those listed under the second subdivision, iron and steel, about 44 are strictly manufactured articles or products. Under the third subdivision, motor vehicles, passenger cars and trucks are both manufactured articles. Under the non-ferrous metals group, 9 are manufactured articles and 11 are semi-manufactured articles. Copper and lead are classed as semi-manufactured articles. Under the final subdivision of plumbing and

heating, all 8 commodities are classed as manufactured articles. In the whole list of Metal and Metal Products, 3 commodities are listed as raw material. Totaling these figures it appears out of approximately 140 articles or products listed under Metal and Metal Products, 110 are manufactured articles, 27 are semi-manufactured and 3 are raw materials.

Thus it is seen that the individual commodities and their individual change in prices from month to month are (the) building blocks used in making up the various groups. There are no group prices given in the bulletins. Lead and copper could drop to one cent a pound and no appreciable effect would be evident in the index numbers of Metal and Metal Products as a group of 141 items. Even if Metal and Metal Products as a group was precisely accurate it would constitute no fair measure of changes in the cost of lead and copper. Hence, Appellants' argument is just as sensible as if we were to take the average height of 140 men, cut a suit of clothes to this measurement and then expect it to fit a short man or a tall man.

The more the said Bureau of Labor publications are studied, the more unreasonable appears Appellants' attempted construction of the price adjustment clause, and these publications alone, considered in the light of what was sought to be accomplished by the price adjustment clause, would amply sustain the Court's construction of that clause.

4. The Testimony of Appellants' Own Chief Witness With Respect to the Origin of the Price Adjustment Clause Here Involved Requires the Construction Placed on It by the Trial Court.

Even if all that we have heretofore said did not satisfy this Court that the trial court correctly construed the price adjustment clause, the testimony voluntarily put on by Appellants (defendants below) would, we believe, foreclose the question adverse to Appellants' position.

Counsel for *Appellants* called as their own witness, Mr. William R. Foster [T. of R. p. 135]. He had been employed by the Department of Water and Power of the City of Los Angeles a trifle over forty years and since 1941 as Purchasing Agent. He first became familiar with the price adjustment clause in 1941 when he was making a study of price adjustment clauses so that the Department could secure the necessary material; that he prepared a "rough draft" and discussed it with representatives of the various firms, including Okonite. On direct examination he testified:

"What was your reason for considering the price adjustment clause at that time? A. Because it was impossible to buy material of any one on a firm price basis." [T. of R. p. 138.]

And on cross-examination by counsel for Appellee (plaintiff below):

"Q. As I understand your testimony, you prepared this price adjustment clause, which you say was identical with this, and gave a copy to Mr. Kennedy? A. No. Just a rough draft." [T. of R. p. 139.]

On redirect examination, Mr. Foster testified:

“A. That clause was worked up primarily in the hopes that we would not have too many adjustment clauses, and we could use one adjustment for the material. It was picked because that group was used in a lot of materials and equipment that we purchased. It was thought it would save the necessity of having different types of adjustment. We changed our own adjustments. We changed first in the latter part of 1946. We renewed what we called the OPA price adjustment clause base in the Office of Price Administration.” [T. of R. pp. 140-141.]

On recross examination, Mr. Foster testified:

“Q. How did you come to put in the escalator clause? A. There were two reasons. The first one was, to be able to do business, and second, the adjustment clause was a protection to the parties.

“Q. You were trying to work out a fair clause for the protection of both parties? A. Yes. The main thing, if prices went down we wanted it.

“The Court: You were buying a great variety of products? A. Yes.

“The Court: All sorts of electrical supplies? A. Yes.

“The Court. You were not interested so much in the general uptrend of prices as in the trend in things you wanted? A. That is correct.

“The Court: If the price of groceries had gone up 100 per cent, you didn’t care; you were interested in the price of electrical products? A. The adjustment clause was to favor those particular commodities.”
(Emphasis added.) [T. of R. pp. 141-142.]

On redirect examination by Appellants' counsel, Mr. Foster testified:

"Q. Why did you choose for the metal products Group VI? A. For the purpose of reducing to the lowest possible minimum the price adjustment clause we would have to use. There are a great many in that group, and we thought, to take a group of that kind, it would reduce a considerable number of price adjustment clauses, which we would have to have." (Emphasis added.) [T. of R. p. 142.]

When the witness said that that group was used in a lot of materials and equipment that he purchased he clearly meant that a lot of material and equipment which they purchased fell under that group. What possible inference can be drawn from this witness' testimony who drafted this clause when he states that the price adjustment was a protection to the parties and he was trying to work out a fair clause for the protection of both parties, and that if prices went down "we" wanted it, other than by a reference to the commodities which they were purchasing. The searching questions asked this witness by the Court and his answers thereto, which we have heretofore quoted, are only consistent with the conclusion that this group of Metal and Metal Products was selected as an *appropriate place* under which to find changes in price of a good many articles and commodities which the Department was purchasing. What possible other meaning can be assigned to his answer to the Court when he stated that the adjustment clause was "to favor those particular com-

modities?” *Here, of course, is the complete explanation as to why lead and copper would not be specifically mentioned in the price adjustment clause.* It was drawn as a general form clause and the specifications which later appear in the contract would cover the particular items and commodities with respect to which the Appellants were requesting bids. Seeing, we believe, the complete destruction of his theory by the testimony of his own witness, counsel for Appellants asked as a final leading question:

“Q. Did you have in mind that the component figure for *many groups* was a more conservative figure on which to adjust the price? A. Yes.

“Q. Rather than the individual commodity? A. Yes.” (Emphasis supplied.) [T. of R. p. 142.]

The words “many groups” in the question make it confusing. A “yes” answer to such a leading question from his own counsel carries little weight, compared to the witness’ detailed testimony. Certainly, at least, the Court, having heard the testimony of Mr. Foster, was entitled to weigh it and to accept such part of it as was convincing to the Court and to draw such reasonable inferences therefrom as the Court might feel proper as bearing upon the main question of the construction of the price adjustment clause which this witness prepared. *United States v. Yellow Cab Co.*, 70 S. Ct. 177 (Advance Sheets—Decided December 5, 1949), hereinafter cited and quoted from under heading VI of this brief.

V.

IT IS WELL SETTLED THAT IF ONE CONSTRUCTION OF A CONTRACT WOULD MAKE IT UNREASONABLE, UNFAIR OR UNUSUAL, AND ANOTHER CONSTRUCTION WOULD MAKE IT FAIR, REASONABLE AND JUST, THE LATTER CONSTRUCTION MUST BE ADOPTED.

The trial court's construction of the price adjustment clause was the only fair, reasonable and just one. But if it be assumed that Appellants' construction was possible, it would render the contract unusual, inaccurate, speculative and unfair, and all of the authorities forbid such a construction.

In *Cohn v. Cohn*, 20 Cal. 2d 65, 70; 123 P. 2d 833, 835-36, the Supreme Court of California stated:

"Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and \$94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of \$650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respondent will receive 45 per cent of the amount 'available for distribution.' *Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted.*" (Emphasis added.)

Cohn v. Cohn, 20 Cal. 2d 65, 70, 123 P. 2d 833, 835-36.

Caletti v. State (1941), 45 Cal. App. 2d 302, 305; 114 P. 2d 9, 10:

“It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted. (*Stein v. Archibald*, 151 Cal. 220 (90 Pac. 536).) *It would seem that here the correction was properly called into use, for it cannot be assumed the contractor was agreeing to take less pay for material actually handled, or that the state was assuming to pay for more yardage than actually removed by the contractor.*” (Emphasis added.) [T. of R. pp. 62-63.]

The statement of the Court in the above case which we have emphasized is particularly appropriate to the case now before this Court.

Yeremian v. Turlock etc., Co., Inc., 30 Cal. App. 2d 92, 96; 85 P. 2d 515, 518:

“A contract must receive such interpretation as will make it reasonable. (Civ. Code, Sec. 1643; 6 Cal. Jur., Contracts, Sec. 269, p. 271.) Here the interpretation urged by defendant would render the contract unreasonable and unfair, and its language does not require such interpretation.” [T. of R. p. 62.]

In *Ohran v. National Automobile Insurance Co.*, 82 Cal. App. 2d 636; 187 P. 2d 66 (cited near the bottom of page 15 of Appellants’ Opening Brief), the Court stated:

“Although it seems doubtful whether the rule that ambiguous insurance policy provisions must be interpreted most strongly against the insurer (*Linnastruth v. Mutual Benefit H. & A. Assn.*, 22 Cal. 2d 216,

218 (137 P. 2d 833)) applies to provisions required to be inserted by statute or regulation (44 C. J. S. 1193) the general rule that where one construction would make a contract *unreasonable or unfair and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted* (*Cohn v. Cohn*, 20 Cal. 2d 65, 70 (123 P. 2d 833); *Stein v. Archibald*, 151 Cal. 220, 223 (90 P. 536)) will apply as well to the construction of compulsory provisions." (Emphasis added.)

Ohran v. National Automobile Insurance Co., 82 Cal. App. 2d 636, 648; 187 P. 2d 66, 73.

Champlin v. Commissioner of Internal Revenue, 71 F. 2d 23 (10th Cir. 1934):

"Nor is there anything to justify the suggestion that Mrs. Champlin was to lose if the wells were dry, but not to profit if they were producers. Such an arrangement ought not to be imputed if a more reasonable construction may be put upon their acts. In a series of cases, the Eighth and other circuits have steadfastly held to the rule clearly stated by Judge Walter H. Sanborn, that where an agreement is fairly susceptible of two constructions, that one will be preferred which is rational and probable, and such as prudent men would naturally execute. (Citing cases.)"

Champlin v. Commissioner of Internal Revenue, 71 F. 2d 23, 28 (10th Cir. 1934).

Bayne v. United States, 195 Fed. 236 (8th Cir. 1912):

"If the construction of the contract adopted by the trial court shall prevail, the plaintiffs will suffer an actual loss of \$3,430.38. If this is the only possible

construction, they cannot complain; but if the contract, without doing violence to its terms, is capable of a different construction more in accordance with justice and fair dealing, then under a well-recognized rule of construction we should adopt the latter.”

Bayne v. United States, 195 Fed. 236, 241 (8th Cir. 1912).

See, also, *Transport Oil Co. v. Exeter Oil Co.*, 84 Cal. App. 2d 616; 191 P. 2d 129, also cited at the bottom of page 15 of Appellants’ Opening Brief, where the Court in construing an oil and gas lease states:

“* * * such leases are to be construed in accordance with their *reasonable and common sense meaning*. (Civ. Code, Sec. 1643; *Irvine v. MacGregor*, 203 Cal. 583 (265 P. 218).)” (Italics supplied.)

Transport Oil Co. v. Exeter Oil Co., 84 Cal. App. 2d 616, 621; 191 P. 2d 129, 132.

In *Moore v. Wood*, 26 Cal. 2d 621; 160 P. 2d 772, cited by Appellants in their Opening Brief at the top of page 15, the Court said:

“The meaning of a written instrument is not to be determined by isolating one term used by the parties and defining it without reference to other language of the contract. (*Skookum Oil Co. v. Thomas*, 162 Cal. 539, 547 [123 P. 363]; *Culley v. Cochran*, 17 Cal. App. 2d 498, 502 [62 P. 2d 168].) On the contrary, for the purpose of ascertaining the intention of the parties, their agreement must be construed as a whole, so that when read together all of its provisions may be given effect. (Civ. Code, Sec. 1641;

Universal Sales Corp. v. California etc. Mfg. Co., 20 Cal. 2d 751, 760 [128 P. 2d 665]; *Ghirardelli v. Peninsula Properties Co.*, 16 Cal. 2d 494, 496 [107 P. 2d 41].)”

Moore v. Wood, 26 Cal. 2d 621, 630; 160 P. 2d 772, 777.

See, also, the following pertinent sections of the *California Civil Code* relating to the construction of contracts:

Sec. 1641 provides:

“Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

Sec. 1643 provides:

“Interpretation in favor of contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”

Sec. 1648 provides:

“Contract restricted to its evidence object. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”

Sec. 1636 provides:

“Contracts, how to be interpreted. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”

VI.

THE FINDINGS OF THE TRIAL COURT ARE PRESUMPTIVELY CORRECT AND WILL NOT BE DISTURBED UNLESS THIS COURT REACHES A DEFINITE AND FIRM CONVICTION THAT THEY ARE CLEARLY ERRONEOUS.

Rule 52(a) of the Federal Rules of Civil Procedure, as Appellants correctly state (App. Op. Br. p. 13), prescribes that findings in actions tried without a jury “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” *United States v. United States Gypsum Co.* (Mar. 1948), 333 U. S. 364; 68 S. Ct. 525; 92 L. Ed. 746 (cited in App. Op. Br. p. 13), states that Rule 52(a) is a continuation of the prior Federal Equity Rule and does permit the Appellate Court to reverse the trial court where the decision of the trial court was clearly erroneous. The Supreme Court in discussing the phrase “clearly erroneous” in 52(a) of the Federal Rules of Civil Procedure states:

“A finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.”

United States v. United States Gypsum Co., 333 U. S. 364, 397; 68 S. Ct. 525; 92 L. Ed. 746, 766.

In addition to the foregoing, the Supreme Court makes this important statement:

“In so far as this finding and others, to which we shall refer, *are inferences drawn from documents or*

undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure *is applicable*. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' ” (Emphasis added.)

United States v. United States Gypsum Co., 333 U. S. 364, 395; 68 S. Ct. 525; 92 L. Ed. 746, 765.

A very recent United States Supreme Court case has again considered the effect of Rule 52(a) of the Federal Rules of Civil Procedure; has held that it applies to appeals by the Government, as well as to other litigants; that findings of the trial court even where there was a “choice between two permissible views” are not clearly erroneous.

United States v. Yellow Cab Co., 70 S. Ct. 177 (Advance Sheets—decided December 5, 1949, 94 L. Ed. 3). This was a suit in equity by the Government under the Sherman Act. The trial court found in favor of the defendant with respect to the charges of conspiracy. We quote pertinent provisions of the opinion of Justice Jackson (page citations are from Supreme Court Advance Sheets):

“What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own.” (P. 178.)

* * * * *

“The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government’s evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.” (P. 179.)

* * * * *

“It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not ‘clearly erroneous.’ ”

U. S. v. Yellow Cab Co., 70 S. Ct. 177, 179 (Advance Sheets—decided Dec. 5, 1949).

In the case of *Hart v. California Pacific Title & Trust Co.*, 136 F. 2d 430 (9th Cir., 1943), this Court (Ninth Circuit) had before it the question of the interpretation

of an option provision in a mining lease. After indicating that appellants' interpretation appears inadmissible, the Court said:

"While the parties might well have employed language more clearly expressive of their intent, yet 'the construction given the instrument by the trial court appears to be consistent with the true intent of the parties, and, where that is the case, *the appellate court will not substitute another interpretation, though it seem equally tenable.*' *Kautz v. Zurich Gen. Acc. & Liability Ins. Co.*, 212 Cal. 576, 582; 300 P. 34, 37." (Emphasis added.)

Hart v. California Pacific Title & Trust Co., 136 F. 2d 430, 432 (9th Cir., 1943).

In *Adams v. Petroleum Midway Co., Ltd.*, 205 Cal. 221; 270 Pac. 668, the question before the Court was the interpretation of a clause in an oil lease.

"If it should be conceded that the provision of the lease is sufficiently uncertain to admit of the meaning which appellant gives it, it certainly cannot be said that the agreement, considered in the light of the facts stipulated to, is not susceptible of the interpretation placed upon it by the court. Hence we cannot disturb the decision. *It was the province of the trial court to resolve doubtful language in the lease.* We are further of the opinion that the construction placed upon the provisions of the lease by the trial court is more reasonable than the interpretation sought by appellant." (Emphasis added.)

Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 224; 270 Pac. 668, 669.

See, also, to the same effect:

Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 584; 300 Pac. 34, 37;

Manley v. Pacific Mill & Timber Co., 79 Cal. App. 641, 648; 250 Pac. 710, 713 (1926);

Riccomini v. Riccomini, 77 Cal. App. 2d 850, 853; 176 P. 2d 750, 752 (1947);

Baird v. Lindblad, 75 Cal. App. 2d 202, 204-205; 170 P. 2d 488, 489 (1946);

Maguire v. Lees, 74 Cal. App. 2d 697, 704; 169 P. 2d 411, 414-415 (1946);

Neff v. Mutual Life Ins. Co., 48 Cal. App. 2d 110, 112-113; 119 P. 2d 404, 406 (1941).

It was clearly within the province of the trial court to draw all reasonable inferences that it thought proper from the price adjustment clause as well as all reasonable inferences from the testimony of the witnesses, and unless the trial court was clearly in error in those respects, its judgment is not to be disturbed on appeal.

VII.

THE CONTENTIONS OF APPELLANTS THAT THE TRIAL COURT ERRED IN (1) ADMITTING THE TESTIMONY OF WITNESS METZ; (2) IN NOT ACCURATELY COMPUTING THE PRINCIPAL AMOUNT OF THE JUDGMENT; (3) IN NOT GIVING SUFFICIENT WEIGHT TO CERTAIN INVOICES, ARE ALL WITHOUT MERIT.

(1) Testimony of Witness Metz.

Specification of error No. 4 (Appellants' Opening Brief p. 6) alleges error in admitting certain testimony given by Mr. Metz, witness for plaintiff below. Over Appellants' objection, Mr. Metz testified that the cost of copper and lead in the cable on the average was 90% of the cost of all material in the cable [T. of R. p. 110]. The Court later on its own motion asked about the insulating material in the cable and *Appellants'* counsel answered this question [T. of R. p. 120]. The cable was before the Court as an exhibit and the Court was entitled to have any pertinent information relating to the problem presented to it. The Complaint alleged [par. IX, T. of R. bottom of p. 5] that "the two principal materials used in the manufacture of said cable were copper and lead * * *." The Answer [par. IV, T. of R. bottom of p. 15] admitted "that lead and copper constitute a large proportion of the materials used in the manufacture of said cable." Consequently it was certainly material to show the average cost of the copper and lead in the cable compared to the other insulating material. While Appellants criticize this

ruling of the Court, nevertheless Appellants put in the detailed costs of copper and lead with respect to each different item of the cable by testimony and exhibits obviously prepared in advance of the trial. This specification of error and Appellants' argument in support of it is groundless.

Similar objections were made to testimony by Mr. Metz that his Company did not have on hand a sufficient quantity of copper and lead to cover the contract. The Court felt that this was information pertinent to the case [T. of R. p. 110].

Another specification is with respect to the testimony of Mr. Metz that the copper and lead in the cable actually cost about \$24,000 over the April prices of such cable. Since the price adjustment clause expressly provided that the contract price shall be subject to adjustment "for changes in labor and/or material costs" it seemed at least *prima facie* incumbent upon the plaintiff to show increased costs had been incurred in order to make the price adjustment clause come into operation. As the record shows, when a motion later was made to strike this testimony, the Court allowed it to stand "not as an indication of damages" but in order to show that there was a substantial fluctuation in prices and whether it was great or small was not material. The Court's comment on this matter is set out in Appellants' Opening Brief at the top of page 10:

"I think I will allow it to stand, to show that it was substantial."

The rulings of the Court with respect to this evidence and the refusal of the Court to strike the same under the conditions set forth in the record were clearly proper. The testimony dealt with operating conditions which the trial court was entitled to know as a part of the problem before it and virtually all of the matters that Mr. Metz testified to were greatly elaborated on by detailed testimony by Appellants' own witnesses [see testimony of witness, Boris A. Gray, T. of R. pp. 146-149].

Nor have Appellants indicated any adverse effect of any of the trial court's rulings.

The *Federal Rules of Civil Procedure* allow great liberality in the admission of evidence by the trial court. (Rule 43(a).)

Rule 61 of the Federal Rules of Civil Procedure provides:

“Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

(2) Computation in Determining the Principal Amount of the Judgment.

The very language of the price adjustment clause itself justified the Court in accepting the method of computation reached in arriving at the amount of the judgment below. The price adjustment clause states:

“The *average* of the monthly *material index figures* for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly *material index figure* with the *material index figure* for the Base Month.” (Emphasis added.) [T. of R. p. 13.]

The Court will note that the language used includes the word “average” and the words “monthly material index figures.” This language is appropriate and may reasonably be interpreted to include the average of the copper and lead figures as well as using such average in computing the percentage of increase in addition to the average over the months in question. That this was the interpretation of Appellants at the time of filing their Answer is abundantly clear from the manner in which index numbers of lead and copper were averaged to obtain the percentage increase in the table set out in Paragraph IX of defendants’ Answer [T. of R. p. 18].

The question of method of computation was never in issue [Defendants’ Answer, T. of R. p. 18]. It was at all times conceded by defendants that if the lead and cop-

per figures were to be used, the plaintiff was entitled to recover \$9,996.69. The trial court was so told during the trial. No accounting testimony was given by either party. All of the necessary data is in the Transcript of Record. Appellants repeatedly stated that the "mathematics" of the computation was correct if plaintiff's (Appellee's) construction of the price adjustment clause was adopted by the Court. Appellants' only argument was for their construction of the price adjustment clause. The Court will note that while Appellants' counsel called witnesses and introduced charts dealing with the cost of copper and lead in the cable he was careful not to ask his own witnesses what the result would be of making the computation separately with respect to lead and copper and separately with respect to each item of cable and the cost of copper and lead therein. Nor do Appellants anywhere in their Opening Brief attempt to show how the computation which was actually made by the Court was detrimental to Appellants.

Some simple arithmetic demonstrates that a computation taking the index numbers of lead and copper separately would only result in increasing the principal amount of the Judgment. The percentage of increase in the lead figures [T. of R. p. 18] down to the first delivery date of October is approximately 21%. The percentage of increase of the copper figures down to the same date is approximately 14%. Appellants state in their Opening Brief that the cost of lead required for the contract was almost twice the cost of the copper required (\$25,034 for

the lead as against \$12,975 for copper). Assuming a ratio of costs of 2 to 1 and taking for simplicity of computation the cost of \$200 for lead and \$100 for copper—21% of \$200 is \$42.00 and 14% of \$100.00 is \$14.00, making a total of \$56.00. On the other hand, using these same figures but taking the average increase of lead and copper together we have 21% plus 14% equals 35%, $\frac{1}{2}$ of which is 17.5%; \$100.00 cost of copper and \$200.00 cost of lead equals \$300.00, the cost of both; 17.5% of \$300.00 is \$52.50, a difference of \$3.50. Since \$300.00 is only a small portion of 50% of the contract price it is immediately apparent that making a separate computation with respect to lead and copper would increase the principal amount of the Judgment by many hundreds of dollars.

(3) Invoices.

Under Point 7 (Appellants' Opening Brief p. 44) Appellants argue that assuming the contract is ambiguous that certain invoices sent by Appellee to the Appellants were entitled to great weight with respect to the construction of the price adjustment clause. Appellants insisted throughout the trial court and also here that the contract is unambiguous. Now it is assumed to be ambiguous for the purpose of saying that the court should have given great weight to certain invoices. But, of course, the weight to be given to any evidence was entirely within the province of the court.

The price adjustment clause expressly provided that the adjustment for increased costs of materials was to take place at the end of the contract, yet these invoices were sent from the San Francisco office of the Appellee long before the termination of the contract. The invoices covered only a few months and were not computed in accordance with the terms of the contract as to delivery dates.

Mr. Metz (plaintiff's witness) testified that he first saw or heard of these invoices in April, 1947; that this was after all of the shipments had been made; that he then caused to be prepared a final invoice dated September 29, 1947, which was prepared under his supervision, after hearing of the prior invoices; that he knew there was a price adjustment clause in the contract to be carried out at the end of the contract [T. of R. pp. 130-132]. This complete explanation of these erroneous interim invoices was entitled to be considered by the trial court in weighing their materiality and evidentiary value. A mere invoice clerk mailing a few erroneous invoices for amounts *not yet due, unknown to the officers in charge of the contract*, is entitled to little weight. The trial court having permitted the introduction of these invoices, having considered the same and weighed them with the other evidence in the case, properly foreclosed this point adversely to Appellants.

VIII.

THE JUDGMENT PROPERLY INCLUDED INTEREST. APPELLANTS WERE ACTING IN THEIR PRIVATE OR PROPRIETARY CAPACITY AND NOT IN THEIR GOVERNMENTAL CAPACITY AND CONSEQUENTLY WERE SUBJECT TO ALL OF THE OBLIGATIONS OF SUCH A PRIVATE CORPORATION, INCLUDING LIABILITY FOR INTEREST FOR NON-PERFORMANCE OF THEIR CONTRACTS.

Under heading 8 of Appellants' Opening Brief at page 46 the contention is made for the first time on appeal that it was error to include interest from the time the money became due until the entry of judgment. Appellants will concede that this question of interest was not raised in the trial court at any stage of the proceedings. Under well settled rules, this Court could disregard it. However, Appellee does not wish to retain any portion of the judgment to which it is not justly entitled, for which reason we join with Appellants in requesting the Court to consider the question of interest and to pass on it upon its merits.

We are satisfied that interest was properly allowed by the court below and that the authorities cited by Appellants (App. Op. Br. pp. 46-48) have no application whatsoever to the case now before this Court. In the first place, in each of the cases cited by Appellants and the supporting authorities contained therein, the political subdivisions there involved were acting strictly in their governmental or sovereign capacities as distinct from their private or proprietary capacities.

It has always been the law of the State of California that when the State or a municipality engages in activities which are proprietary in character it becomes subject to all of the obligations of a private individual or a private corporation and the ancient theory that "a king can do no wrong," ceases to exist. It is well settled that the Department of Water and Power of the City of Los Angeles in carrying on its activities acts in a private or proprietary capacity.

See, *Douglass v. City of Los Angeles*, 5 Cal. 2d 123, 134; 53 P. 2d 353, wherein it is stated:

"The department of water and power is conducted by the city in its proprietary capacity. This department has control of its own revenues and disbursements and in the ordinary course of its management would not be dependent on the city council for an appropriation to meet a demand for damages for the negligence of its officers or employees. The liability of the city for such negligence, through the operations of such a department, was established long before the enactment of the statute of 1923. (*Davoust v. City of Alameda*, 149 Cal. 69 (84 Pac. 760, 9 Ann. Cas. 847), 5 L. R. A. (N. S.) 536).)"

Douglass v. City of Los Angeles, 5 Cal. 2d 123, 134; 53 P. 2d 353.

See, also, to the same effect:

Peccolo v. City of Los Angeles, 8 Cal. 2d 532, 536; 66 P. 2d 651.

Chafor v. City of Long Beach, 174 Cal. 478; 163 Pac. 670, is a leading case dealing with the liability of a city for negligence while acting in its proprietary capacity. This case discusses at length the origin of the rule of sovereign

immunity and its modification in cases where the sovereign engages in private or proprietary activities and states that while acting in the latter capacity its contracts and obligations are to be regarded as those of a private corporation.

A short statement of the rule is contained in the case of *Davoust v. City of Alameda*, 149 Cal. 69; 84 Pac. 760:

“Such a corporation, however, has a double character—governmental, and also proprietary and private—and *when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations*. And while we have been referred to no case in this state where the proposition last stated was directly involved, yet in all *the cases from this state cited by respondent the acts complained of were connected with the exercise of what has uniformly been held to be governmental functions, such as maintenance of public streets and roads, protection from fire, etc.* However, the distinction has been frequently recognized and stated in the California decisions.” (Emphasis added.)

Davoust v. City of Alameda, 149 Cal. 69, 70; 84 Pac. 760, 761.

An excellent statement of the principle also appears in the case of *Brown v. Town of Sebastopol*, 153 Cal. 704; 96 Pac. 363, which is as follows:

“It is well settled that the contract of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality. Says Bigelow on

Estoppel (sec. 1128): 'But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, and when such a contract comes before a court the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons.' "

Brown v. Town of Sebastopol, 153 Cal. 704, 709.

18 Cal. Jur. par. 279, p. 1000, states the rule as follows:

"It is settled that contracts with municipal corporations, when exercising other than governmental functions and within the limit of charter powers are construed by the same laws that govern the contracts of private individuals."

See, also, to the same effect:

Morrison v. Smith Bros., 211 Cal. 36; 293 Pac. 53;

Yolo v. Modesto Irrigation Dist., 216 Cal. 274; 13 P. 2d 908;

Corporation of America v. Durham Mutual Water Company, Ltd., 50 Cal. App. 2d 337;

People v. Superior Court, 29 Cal. 2d 754.

In the case of *Village of Oshkosh v. Fairbanks, Morse & Co.* (C. C. A. 8, 1925), 8 F. 2d 329, the Eighth Circuit stated the principle as follows:

"In constructing these plants the village acted in its purely private business capacity to supply itself and its inhabitants with light and water, and its meas-

ure of liability is the same as that of a private individual or corporation under like circumstances.”

Village of Oshkosh v. Fairbanks, Morse & Co. (C. C. A. 8, 1925), 8 F. 2d 329, 330-331.

1 *McQuillan on Municipal Corporations*, par. 143, p. 432, announces the same principle.

“And whatever its origin, the municipal corporation in many of its most important aspects is treated as a private corporation, and is, therefore, *in this respect subject to all of the obligations*, and is entitled to all of the benefits of private laws.” (Emphasis added.)

1 *McQuillan on Municipal Corporations*, par. 143, p. 432.

With respect to the question of interest *Sutherland on Damages*, par. 332, p. 1046, states:

“Any other rule is *fraught with injustice and if once established would exclude men of scanty means from taking such contracts, as the delay in payment and loss of the use of the money might, and in many cases would, cause a serious loss which, to one not possessed of ample means, could result in bankruptcy.* In its business transactions a city should be required to conform to the ordinary rules and all exemptions claimed which would work injustice should be denied.” (Emphasis added.)

Sutherland on Damages, par. 332, p. 1046.

The cases cited by Appellants which hold that the State or a municipality is not liable for interest deal only as we have stated with activities in their governmental capacity, but even in such governmental or sovereign activities the Legislature has completely changed the rule with respect to the allowance of interest.

Section 16051 of the Government Code of the State of California (added by Stats. 1945, ch. 119, Sec. 2) in a chapter dealing with actions against the State of California provides as follows:

“Amount of judgment. If judgment is rendered for the plaintiff, it shall be for the legal amount actually found due from the State to the plaintiff, *with legal interest from the time the claim or obligation first arose or accrued*, and without costs. (Added by Stats. 1945, ch. 119, Sec. 2.” (Emphasis added.)

Sec. 16051 Government Code of the State of California.

It is thus seen that even as to strictly governmental activities the Legislature has abrogated, with respect to the question of interest, the rule announced in the cases cited by Appellants in their Opening Brief and if those very cases were today before the California courts, in view of the statutory provision above quoted, the allowance of legal interest from the time the claim or obligation first arose or accrued would have been proper. What Appellants in their Opening Brief refer to as “public policy” (App. Op. Br. p. 47) has ceased to exist even in the gov-

ernmental activities of the State and its subdivisions. They are no longer “presumed to be always ready to pay” what they owe and the entire basis of Appellants’ argument relating to interest disappears.

A diligent search has disclosed no case in California or elsewhere where any court has held that a municipality is not liable for interest upon its obligations where acting in its private or proprietary capacity. Neither reason nor authority supports Appellants’ contention that the trial court erred in allowing interest upon the amount found due in this case. Appellants’ contention with respect to this interest question is wholly erroneous and without merit and we respectfully request that this Court announce the true rule governing this question and that Appellants request that the interest item be stricken from the Findings and Judgment be denied.

CONCLUSION.

From a consideration of the subject matter of the contract, electrical cable, principally composed of lead and copper, its only metallic components; from an analysis of the terms and provisions of the price adjustment clause expressly referring to the materials used in the construction of the cable; from a consideration of the United States Bureau of Labor Statistics referred to in the price adjustment clause and in view of the testimony of Mr. Foster, Appellants' own chief witness, it conclusively appears that the construction placed upon the price adjustment clause by the trial court was proper. This construction rendered the contract fair, just and reasonable. The construction contended for by Appellants would render the contract unreasonable, inaccurate, speculative and unfair.

The allowance of interest was proper since the Department of Water and Power of the City of Los Angeles was acting in a private or proprietary capacity and its obligations, therefore, are those of any private individual or private corporation.

It is respectfully submitted that the judgment of the trial court should in all particulars be affirmed.

Respectfully submitted,

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No. 12337

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS
ANGELES, THE CITY OF LOS ANGELES, a Municipal Cor-
poration,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPO-
RATED,

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

JAN 14 1950

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No. 12337

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS
ANGELES, THE CITY OF LOS ANGELES, a Municipal Cor-
poration,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPO-
RATED,

Appellee.

APPELLANTS' REPLY BRIEF.

I.

Summary of Argument.

The question is simply the construction of an unambiguous contract. Appellee's brief makes the question appear too complex. The Court's function is to enforce the contract as made,—not create a new one. There is no ambiguity; so Appellee's aids in construction are improper. The Answer contains no admissions as claimed by Appellee. The suggestion of points advanced for the first time on appeal is incorrect. Appellee assumes ambiguity, overplays lead and copper, misconstrues terms, the index table, and Foster's testimony. Escalation on the group index is fair and allows for a profit. Assuming ambiguity, the Findings are clearly erroneous. Mr. Metz's testimony was erroneously admitted. Trial court's formula is incorrect and without support. Billing and payment on the group index binds Appellee. It was error to allow interest.

ARGUMENT.

II.

The Simple Question Presented Is the Construction of the Terms of an Unambiguous Contract and Is Not as Involved, Complex or Difficult as Appellee's Reply Brief Seems to Make It Appear.

- (1) The Function of a Court Is to Enforce the Contract as Made and Not Create a New Contract by Inserting Words Not Used by the Parties.

A plain reading of the contract is the most important act to be performed by this Court. Appellee's Reply Brief continuously endeavors to evade this simple treatment of the case by arguing single words and phrases and small detailed bits of evidence which tends to confuse and hide the real issue. It might be termed an attempt to make capital out of a "hindsight hard-luck story," diverting attention from the real question, which is whether the contract is reasonably or fairly susceptible of different constructions. Appellee's argument might be stated to consist of contentions as to what the parties should have, could have or might have done, and not what they actually did do in executing this contract.

This Court is well familiar with the applicable rules for construction of the contract and so only a few cases and code sections will be noted.

The applicable code law to the question of interpretation presented here is found in California Civil Code Sections 1635, 1636, 1637, 1638, 1639, 1644 and 1645.

The rules in the chapter of the Civil Code where these sections are found are to be applied to ascertain the intention of the parties *if otherwise doubtful*. The language governs interpretation if clear and explicit and *does not involve an absurdity*. The intention is to be ascertained from the writing alone, *if possible*.

On pages 1 to 3 of the Appendix to this brief are cited several decisions by this and other courts, with a statement of the rule of construction announced.

**(2) Where There Is No Ambiguity in the Contract, It Must
Speak for Itself.**

In Appellants' Opening Brief (pp. 13 to 20) cases are cited holding that the District Court's Findings may be set aside where clearly erroneous, and it is a question of law for this Court to determine whether any uncertainty or ambiguity exists in the contract.

Additional cases in point on the proper interpretation of a contract are cited and digested on pages 1 to 3 of the Appendix to this brief under II.

Throughout appellee's brief the position is taken, without expressly so stating, that it is proper to explain this contract "by reference to the circumstances under which it was made and the matter to which it relates," as provided in California Civil Code Section 1647. The rule in California is that Section 1647 of the Civil Code and Sections 1856 and 1860 of the Code of Civil Procedure can be invoked only to explain an ambiguity, which appears upon the face of the contract itself, by reference to the circumstances under which it was made and the matter to which it relates.

The first point to be determined is whether an ambiguity is found in the language and whether the trial court erred in receiving parol evidence in respect to the construction. There is no ambiguity. It was error to receive parol evidence.

Barnhart Aircraft, Inc. v. Preston (1931), 212
Cal. 19, 21, 22-24.

The code sections are but an enactment of the common law rule. It is never within their contemplation that a written contract shall have anything added to it or taken away from it by evidence of "surrounding circumstances." The rule of evidence is invoked and employed only where, on the face of the contract itself, there is doubt and evidence is used to dispel that doubt, not by showing that

the parties meant *something other than what they said*, but by showing what they meant by *what they said*.

United Iron Works v. Outer Harbor Dock and Wharf Company (1914), 168 Cal. 81, 84.

In *Johnson v. Pugh* (1901, Wisconsin), 85 N. W. 641, it was contended that evidence of circumstances surrounding and leading up to the making of a written contract is always admissible, not for the purpose of changing or varying the terms, but for the purpose of putting the court in possession of the circumstances of the parties at the time of contracting. This is answered emphatically at page 642:

“Not so! Where there is no ambiguity in the contract, either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters.”

Of the cases cited the Wisconsin court says that they come down finally to the simple proposition that where there is no uncertainty of sense, there is no room for construction. The *Johnson* case was cited and quoted with approval in *Peterson v. Chaix* (1907), 5 Cal. App. 525, 531.

Under the foregoing authorities the contract must speak for itself, entirely unaided by extrinsic matters, where there is no ambiguity. It must appear incomplete on its face before parol evidence is admissible to complete it, and then such evidence must be consistent with and not contradictory of the contract.

The foregoing cases demonstrate that Specification of Error No. 4 was correctly taken. The court erred in admitting the specified portions of Mr. Metz's testimony. (App. Op. Br. pp. 6 to 10.)

Appellants submit the real question is as presented under the foregoing authorities,—not as stated by appellee. Under the authorities presented appellee's statement of the basic question is incorrect.

III.

Appellants Have Never Admitted That the Use of the Index of Wholesale Prices of Lead and Copper Was Correct or That They Should Be Treated Equally.

Appellants Answer [T. of R. pp. 15-18, par. IV] definitely put in issue appellee's allegation as to the "monthly index figures referred to in said contract and compiled by the United States Department of Labor." [T. of R. pp. 5 and 6, par. IX.]

The Answer admits and alleges that the group index showed an increase in material costs and the Department of Labor publication of the index of wholesale prices as shown by Plaintiff's Exhibit 1, and the groups, subgroups and the index numbers for lead and copper. The Answer further alleged a computation by which the lead and copper indexes were averaged to obtain the amount of increases alleged by plaintiff. The Answer then denied all of Paragraph IX of the Complaint not expressly admitted. This was a denial that the *monthly index figures referred to in the contract* increased except as the group index increased. The Answer denies the formula or that the proper index figures were used, but admits the arithmetic. That is all. It was done to expose plaintiff's error in using lead and copper indexes and averaging them. A careful reading of the pleadings by appellee would have avoided any conclusion of such an admission by appellants. The claim is without merit. It is not an alternative for the court, though the computation in the Answer is correct but not the formula.

The impropriety of plaintiff's theory and formula adopted by the court is demonstrated by the argument in appellants' brief (pp. 39-43) under the heading "6. If the Contract Does Not Provide for Price Adjustment Based Upon the Group Index, There Is No Contract for Price Adjustment." There is no evidence whatsoever to show or support the computation required under plaintiff's theory and adopted by the court.

IV.

The Suggestion in Appellee's "Statement of the Case" of Certain Points Advanced for the First Time on This Appeal Is Incorrect.

Appellee's "STATEMENT OF THE CASE" (Reply Brief pp. 7-11) says appellee wishes to make certain additional statements "which have a bearing upon certain points advanced for the first time on this appeal by appellants. * * *" Appellee's reference to the pre-trial memoranda and the quotations therefrom merely show that the question on this appeal was presented in the trial court, namely, "the correct interpretation of the Price Adjustment Clause."

Appellants are at a loss to determine the import of appellee's reference to appellants' objections to the findings unless it is to suggest that appellants have refrained from presenting matters which were presented to the trial court. These objections, if in the record, would further demonstrate to this Court that the points advanced in the trial court are the ones advanced here.

"There were included in the record proposed findings and objections thereto. This was improper. Federal Rules of Civil Procedure, rules 52(a), 75(e), 27 U. S. C. A. following section 723c. * * *"

U. S. v. Forness (2 Cir., 1942), 125 F. 2d 928 at 942.

Also it would have unnecessarily increased the cost of this appeal.

These objections referred to Defendants' Exhibits B and C in evidence, and argued that the cost of lead and copper in the materials was unequal and varied considerably as to the various items or types of cable; that there is no method set forth in the Findings for relating the percentage of increases to the contract price to arrive at the amount of the recovery stated because there is no formula for using the index figures for lead and copper from which any percentage could be obtained.

Appellee's "STATEMENT OF THE CASE" adds nothing and its suggestion here of the foregoing "points advanced for the first time on this appeal by appellants" is baseless.

V.

Appellee's Argument Assumes the Contract Is Ambiguous and Overemphasizes the Subject Matter, Misconstrues Its Terms, the Department of Labor Data, and Mr. Foster's Testimony.

(1) Subject-matter of the Contract.

The Price Adjustment Clause was drawn to cover any material purchased under the contract, and had been used since 1941 for the purchase of various types of equipment and materials. [T. of R. pp. 135-142.] This court should not be misled by the fact that the only metals used in making the cable were lead and copper, or that copper and lead cost 90 per cent of the cost of all material used in the cable. Here, again, appellee brings up its claim of admissions in appellants' answer. This has been covered under Point III, *supra*, in this brief. (App. Rep. Br. p. 15.)

Appellee argues that in view of the circumstances, it would be "unusual," to say the least, that parties should contract for the use of index of wholesale prices for metals and metal products group.

"The fact that the construction placed upon the contract makes it an *unusual* one is immaterial. Parties are not bound to enter into the *usual* contracts and there is no legal presumption that they will do so." (Italics supplied.)

Holman v. Musser (1922), 59 Cal. App. 734, 738.

Appellee then makes a speculative argument that the use of the group index would be speculative and entirely unreasonable, citing one commodity which decreased in price while the group index increased.

The contract should be read and understood without regard to the materials being purchased. While the use of the group index might, as judged now with the aid of "hindsight," make the contract unreasonable as to appellee, it is made reasonable in price as to appellants.

In construing the contract in question it must be borne in mind that nearly every business venture entails some assumption of risk, some element of gambling.

Transportation Guarantee Company, Ltd. v. Jellins
(1946), 29 Cal. 2d 242 at 248.

Appellee's attempt to ridicule the use of the group index cannot change the meaning of the plain words of the Price Adjustment Clause.

(2) The Terms and Provisions of the Price Adjustment Clause and the Department of Labor Data.

Appellants' brief (pp. 25 to 43) deals with the terms and provisions of the Price Adjustment Clause, and we submit fully demonstrates that the parties intended the use of the group index.

Appellee in its brief (pp. 17 to 25) picks out words, phrases and parts of phrases from the clause to support its contention, straining and twisting at the language of the clause until it breaks. Appellants' answer to this is a plain, simple reading of the unambiguous clause without reference to the subject-matter or to circumstances, or the use of "hindsight."

Appellee's argument regarding the use of the terms "material," "material costs" and "increases in material costs," is an attempt to make the contract say what it does not say. Whether the clause is artfully drawn or not, as appellee states, "its meaning is clear." (Appellee's Reply Brief, p. 18.) There is a "Metals and Metal Products" group. It is the sixth group and the Roman numeral conveys the same meaning generally to all as the Arabic numeral or as the word "sixth." This is absolutely clear.

On page 19 of its brief, appellee says "it should be noted that before the quoted words 'Group VI—Metals and Metal Products,' the words 'wholesale prices' appear, but there are *no* wholesale *prices* given for Metals and Metal Products as a group." This is misleading. Instead

of the two words "wholesale prices," the four words "index of wholesale prices" appear before the phrase "Group VI—Metals and Metal Products." Price adjustment is to be based upon the *index of wholesale prices*—not upon *wholesale prices*.

Next, appellee attempts to make capital out of the use of the phrase "the average of monthly material index figures," as being inconsistent with a group as a whole. The plural "figures" is used because there is more than one month in the contract period and the average of the monthly figures is to be taken. The index of wholesale prices for the group for any month is a figure, and there are more months than one. The index of wholesale prices is the material index figure.

Having mentioned "Metals and Metal Products" once, it certainly was not necessary to continuously repeat the term to anyone familiar with the Department of Labor indices. It was proper to continue to refer to the monthly material index figure. Once the clause takes the reader to the group index, that is sufficient.

On page 20 of its brief appellee makes several concessions for appellants. The first, regarding Mr. Foster's testimony, is not a concession made by appellants but a summarization of his testimony at page 35 of their brief. Appellants are not bound to concede that they are obliged to give up prefix "Group VI." The prefix "Group VI" has a clear meaning. It is used in the contract and should be given its usual, common meaning, rather than be stricken from the contract.

There is no evidence in the record to show that there is or is not any other grouping of commodities similar to the "Metals and Metal Products" group. There are many indexes published by the Bureau of Labor Statistics and by others which might well be agreed upon as a substitute. At the most the clause was a contract to agree upon a substitute index.

Appellee argues that the parties should not have contracted for a clause providing for escalation upon the index for a group which contained manufactured products. This is exactly what they did. This is an argument as to what they should not have done rather than what they did. The remaining portion of page 22 is devoted to arguing possibilities and what might have been.

This contract shows that the appellants were not “playing roulette” but were safeguarding themselves against increasing costs during the period involved.

Appellants’ Opening Brief (pp. 25-34) completely answers appellee’s argument as to the meaning of the term “group” and the index of wholesale prices, compiled monthly by the U. S. Department of Labor, and whether “Metals and Metal Products” is the sixth group and the one set forth in the contract.

Appellee’s Reply Brief (pp. 24 and 25) fails to answer appellants’ argument (Appellants’ Opening Brief, pp. 37-39) that the Price Adjustment Clause was not intended to achieve complete accuracy in the adjustment of prices. The formula was not intended to be drafted with that degree of refinement which would correspond to the actual facts.

Appellee’s Reply Brief on pages 29 to 32 quotes excerpts from the testimony of Mr. Foster. All his testimony is summarized on pages 35 and 36 of Appellants’ Opening Brief and appears on pages 135 to 142 of the Transcript of Record. We submit that his testimony must be considered as a whole and that the inferences attempted to be drawn by appellee are unreasonable.

Appellee actually argues that the contract means that the group was designated by the contract as “an *appropriate place* under which to find changes in price of a good many articles which the Department was purchasing.” This is saying that whether the contract was for lead-covered cable, steam turbine electric generators, oil circuit

breakers, metal enclosed switch gear or other types of machinery, the clause was used to show the appropriate "city" in which the "persons" could be found without expressly stating their correct addresses by number and street in the "city." Obviously, we submit, this was not the case here. Accurate draftsmanship and terminology were used throughout the clause. The adjustment for labor increases was to be based on the lowest possible division in a particular index and it was expressly named. It corresponded to a single commodity in the wholesale price index. It was a subdivision of a larger group which was one of several groups making up the entire table. In the case of materials, it was not intended to go beyond one of the major divisions of the table.

(3) Mr. Foster's Testimony.

At page 32 of Appellee's Reply Brief it is stated that the words "many groups" in a question addressed to Mr. Foster make it confusing. Appellants submit that this is a mistake in the transcript and that the word used must have been "commodities," which would conform to the question which followed. The two questions and his answers definitely state that he had in mind that the component figure for many commodities was a more conservative figure on which to adjust the price than the individual commodity.

VI.

Appellants' Construction Makes the Contract Fair, Reasonable and Just and Allows for a Substantial Profit.

A plausible argument can be made that under the evidence about \$7,500 out of the unescalated 30% or \$27,328 of the total of \$96,694 must include some profit; so that appellee can't be losing money on this deal. Appellee's Reply Brief at page 24 omits any mention of *profit* in the 30%.

None of the cases cited (App. Rep. Br. pp. 33-37) are in point.

Two of the cases show that the two constructions must be "equally consistent with the language," which is not true here.

Another case says the rational and probable construction will be preferred "where an agreement is fairly susceptible of two constructions."

Another case says *if without doing violence to its terms* the contract is capable of a different construction which is more in accordance with justice and fair dealing, that would be adopted.

More in point is a statement in *Francisco v. Schleischer* (1920), 50 Cal. App. 670, 675, which may well serve to answer appellee's contentions:

"It is urged that such construction makes the undertaking of the defendant quite unreasonable, but it ought not to be necessary to observe that many persons enter into unreasonable contracts, and it is no function of the courts to relieve them from the effects of their foolishness."

VII.

Assuming the Contract Is Not Clear, There Is No Conflict in the Evidence and the Findings Are Clearly Erroneous and Should Be Set Aside.

Appellants' Opening Brief (pp. 13 to 16) cites Rule 52a of the Federal Rules of Civil Procedure and decisions holding that in an action tried without a jury, where findings are clearly erroneous, they may be set aside on appeal by this Court.

Another case to the same effect is *Daitz Flying Corporation v. U. S.* (2nd Cir., April 7, 1948), 167 F. 2d 369, 371. There the facts were held not debatable and a finding inconsistent with such facts was held clearly

erroneous, even though a witness had made “pitiful attempts upon the stand to put another meaning upon his report. * * *”

The cases cited in Appellee’s Reply Brief (pp. 38 to 42) do not hold to any different rule than that contended for by appellants.

The reviewing court has power to reverse the judgment when it is left with a definite and firm conviction that a mistake has been committed and therefore the finding is clearly erroneous.

United States v. U. S. Gypsum Co. (March, 1948), 333 U. S. 364, at 394, 395.

The case of *United States v. Yellow Cab Co.*, 70 S. Ct. 177 (Advance Sheets, decided December 5, 1949), 94 L. Ed. 3, was not a contract case, but a conflict in the evidence by nine witnesses, 485 exhibits, and defendant’s witnesses.

The remaining cases cited by appellee on pages 42 and 43 of its brief are not in point. They deal with cases tried upon an agreed statement of facts, with ambiguous contracts, doubtful language, conduct of the parties supporting the trial court’s interpretation, and where the judgment is based upon conflicting evidence. They have no applicability to the case at bar, where there is no conflict whatsoever in the evidence.

Although appellee argues that the trial court could draw all reasonable inferences that it felt proper from the Price Adjustment Clause, as well as all reasonable inferences from the testimony of witnesses, it practically admits that if the trial court was clearly in error in these respects, the judgment should be reversed. We submit that the trial court was in error and the judgment should be reversed.

VIII.

The Errors in Admitting Mr. Metz's Testimony Were Inconsistent With Substantial Justice.

Errors of the trial court in admitting Mr. Metz's testimony set forth in Specification of Error No. 4 (pp. 6 to 10) in Appellants' Opening Brief and argued under V, Argument, 3 (pp. 22 to 25) are commented on in Appellee's Reply Brief (pp. 43 to 45). Although it may so appear in the Transcript of Record, appellee is incorrect in saying that appellants' counsel answered the court's question about the insulating material in the cable. Mr. Metz was on the stand and answered the court's question "What is that solid matter in the center?" by saying "That is paper and insulation."

The contract was not ambiguous, so the court erred in admitting his testimony over proper and timely objection. This is so held by three cases cited and quoted from, *supra*, in this brief:

Barnhart Aircraft, Inc. v. Preston (1931), 212 Cal. 19, 21, 22-24;

United Iron Works v. Outer Harbor Dock and Wharf Company (1914), 168 Cal. 81, 84;

Peterson v. Chaix (1907), 5 Cal. App. 525, 531.

Defendants' Exhibits B and C and Mr. Gray's testimony [T. of R. pp. 146 to 150] were introduced by appellants to prove the variations in weight and cost of lead and copper in this contract and in each of the six types of cable. The lack of basis in fact for treating lead and copper on a 1 to 1 basis is fully argued and demonstrated in Appellants' Opening Brief at pages 39 to 43 (V, Argument, 6).

Exhibit C shows that at one extreme the ratio was copper 1 : lead 0.73. At the other extreme the ratio was copper 1 : lead 9.05,—not a ratio of 1 : 1, as used by the court in making its Findings as to the amount of the judgment.

IX.

The Formula Upon Which the Trial Court Computed the Amount of the Judgment Is Incorrect and Is Not Supported by the Evidence.

Appellee's Reply Brief on pages 46 to 48 attempts to justify the trial court's formula. Here, again, is an attempt to rewrite the contract of the parties or to make the word "average" perform double duty. Appellants' Opening Brief (pp. 20, 21) quotes a portion of the Price Adjustment Clause and demonstrates by striking out and underlining the words stricken and added so that the paragraph would contain the wording necessary to support the trial court's finding. Now appellee argues the word "average" "may reasonably be interpreted to include the average of the copper and lead figures as well as using such average in computing the percentage of increase in addition to the average over the months in question." This requires that the word "average" be given a new definition to mean "average of the average." The clause says that the "average of the monthly material index figures * * * will be computed * * *." There was an index figure for more than one month, so the clause properly uses the phrase "material index figures" for the period. This is indeed straining at a word which is present once but which to support the trial court's finding must be found twice. To support the Findings requires a clause adding more words.

Contrary to appellee's statement on page 46, "the question of method of computation was" *always* in issue, as has been previously argued and demonstrated in this brief. The mathematics are correct. The formula used is wrong. Lead and copper figures are incorrectly used and they are incorrectly given equal weight. Appellants never told the trial court at any time that they conceded that if lead and copper figures were to be used, the plaintiff was entitled to recover the amount of the judgment. Appellants introduced evidence at the trial of the action proving, and argued on the trial of the action and upon the hearing of appellants' motion for new trial, that there was no basis

in fact for treating lead and copper equally by averaging the lead and copper index figures. The trial court was wrong in two instances: (1) in using lead and copper index figures, and (2) in averaging or assigning equal weight to the index figures. It is to the detriment of these appellants if a judgment is entered against them which has no support in the evidence. The computations in appellee's brief cannot supply the lack of evidence to support the judgment. The theory of the court was clearly erroneous and its Findings of Fact and Judgment based thereon likewise clearly erroneous.

X.

Appellee Is Bound by Its Sending of the Six Invoices Computing Escalation on the Group Index.

Neither Mr. Metz nor Appellee's Reply Brief (pp. 48, 49) successfully explain away the sending of these invoices. These were invoices of his company in the course of business and paid in the same manner. [T. of R. pp. 129, 130.] Mr. Metz was Vice President, Treasurer and Chief Executive Officer of appellee. [T. of R. p. 132.]

In *Nevin v. Mercer Casualty Co.* (1936), 12 Cal. App. 2d 222, the court says "It necessarily follows that the authority of the person sending the letter was thus admitted." Likewise, it follows that the authority of the sender of the invoices was admitted by the company.

XI.

Appellee Cannot Recover Interest Prior to Judgment In This Action.

None of the cases cited by appellee in its argument for the allowance of interest *involves a question of interest*. The cases cited discuss the question of whether in tort actions arising out of proprietary functions, a municipality is liable for negligence like individuals or private corporations, whether the doctrine of estoppel may be invoked on behalf of or against a municipality, and whether a Nebraska statute limiting the amount of tax levies and bond issues also limits the power of a Nebraska municipi-

pality to contract for a plant costing in excess of the limitation.

We are not here concerned with such questions. The question is whether in an action against a municipality, interest may be recovered prior to judgment in the absence of express statutory authority or contract therefor. On this question appellee has cited no cases in point.

Likewise, the quotation from 18 California Jurisprudence, Paragraph 272 on page 53 of Appellee's Reply Brief is not in point. In the footnote to the quotation is found the case of *Brown v. Town of Sebastopol* (1908), 153 Cal. 704, 96 Pac. 363, also cited by appellee, holding that a municipal corporation may invoke the doctrine of estoppel in its favor. This is the law, but it has no application to the question of allowance of interest.

The relevant quotation from Paragraph 272 of 18 California Jurisprudence would be that contained on pages 998 and 999:

"The making of contracts by municipal corporations is, in general, governed by their charters. When a freeholders' charter contains a complete scheme upon the subject, it will control over general laws."

18 California Jurisprudence, Paragraph 365, page 1120, should also be quoted:

"A municipal corporation cannot be held to the payment of interest on its debts unless so required by a statute or by a lawful contract."

Also, the quotation from McQuillin on Municipal Corporations on page 54 of Appellee's Reply Brief is not in point. It is taken from a general historical section and is wholly without any citation of authority.

The relevant quotation from McQuillin would be that contained in Volume 5, Paragraph 2099, page 529, Second Revised Edition, in the chapter discussing payment for public improvements in the paragraph entitled "Interest on Sums Due," which states:

"Whether the contractor is entitled to interest on money due him but unpaid depends upon the statutory or charter provisions relative thereto and also on the

terms of the contract under which the work was done.”

and cites, among other cases, the case of *Powell v. The City of Los Angeles* (1928), 95 Cal. App. 151, 272 Pac. 336.

The quotation from Sutherland on Damages, as to that author's opinion in 1916 of what the law should be, is not supported by citation of any cases, and of course cannot be relied upon to overrule what the law has been declared to be.

Appellee is in error in urging that Section 16051 of the Government Code of the State of California, as enacted in 1945, changed the rule with respect to the allowance of interest. First, it is to be noted that Section 16051 is a part of the law of claims against the State of California, and is not applicable to claims against appellants. Secondly, it was not a new enactment in 1945. Substantially the same language as that quoted on page 55 of Appellee's Reply Brief has been in effect for 57 years. Section 5 of “An Act to authorize suits against the State, and regulating the procedure therein” (Stats. 1893, Ch. 45) was in effect until 1929, when it was repealed and re-enacted as a part of Political Code Section 688 (Stats. 1929, Ch. 516). Political Code Section 688 was in effect until 1945, when it was repealed and re-enacted as Government Code Section 16051. (Stats. 1945, Ch. 119.)

We submit that appellee's argument merely confuses the issue. It is necessary to return to certain fundamentals:

1. The California cases uniformly hold that a municipal corporation cannot be held to the payment of interest on its debts unless so required by contract or by statute.
2. The contract herein does not provide for interest.
3. No applicable statute provides for interest.

(a) The Government Code sections on the law of claims against the State of California (of which Section 16051 is a part) are not applicable to appellants.

(b) The Charter of The City of Los Angeles (Article XXVIII) is applicable on the law of claims against appellants.

(c) Said Charter provides but a single system for claims against appellants, whether they are exercising governmental or proprietary functions. See *Continental Insurance Company v. City of Los Angeles* (1928), 92 Cal. App. 585, 268 Pac. 920, requiring compliance with the Charter in making claims arising out of proprietary functions of appellants.

(d) Said Charter does not provide for the payment of interest.

Appellee quotes broad language employed in cases with reference to entirely different circumstances, and in so doing, has fallen into the same error pointed out in *City of Los Angeles v. Los Angeles Building and Construction Trades Council* (Oct., 1949), 94 A. C. A. 34 (Petition for hearing in the Supreme Court denied Dec. 5, 1949). It was contended that when a city was acting in a proprietary capacity, the city was subject to the same obligations and liabilities as a private employer, and accordingly the availability to it of injunctive relief against strikes and picketing was the same as that of a private employer. The court pointed out that distinctions between governmental and proprietary functions of a city arose out of tort liability. It refused to apply such distinctions to a case where the charter created a single civil service system governing all positions in the city's service, regardless of whether they involved an exercise of governmental or proprietary functions. (At pp. 3-5 of the Appendix to this brief will be found a quotation of the court's language on this point.)

Likewise in this case no legitimate reason can be found for drawing any distinction between the governmental and proprietary functions of the City. A single system governs claims against the City, regardless of whether they involve an exercise of governmental or proprietary func-

tions. If the courts were to say that the provisions of the Charter concerning claims relate to the exercise of governmental functions but not to proprietary functions, that would be judicial legislation.

The rule with respect to allowance of interest set forth in Appellants' Opening Brief (p. 46) is so well settled that appellants deemed it unnecessary to cite further authority in their Opening Brief. However, the cases listed on page 5 of the Appendix to this brief, could also have been cited in accord with the rule in the *Ingebretson* case.

We submit that Appellee's claim for interest is wholly erroneous and against all authority, and that therefore the amount of the interest prior to judgment, \$1,306.21, should be stricken from the Findings, Conclusions of Law and the Judgment.

Conclusion.

For the reasons and arguments advanced in our Opening Brief and in this brief, appellants respectfully submit that interest prior to judgment cannot be recovered in this action; that the judgment of the District Court is clearly erroneous; that the judgment in this case should be reversed and the case remanded with directions to the District Court to enter judgment in favor of appellants that the plaintiff and appellee take nothing.

Respectfully submitted,

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APPENDIX.

II.

“Rules for Construction of a Contract” (See II. of Argument).

Contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in a plain, ordinary and popular sense.

Imperial Fire Ins. Co. v. County of Coos (1894),
151 U. S. 452 at 463, 38 L. Ed. 231, 235.

Courts are without power to modify contracts or to distort the plain meaning of the language used by the parties to them.

Transcontinental and Western Air v. Parker
(Eighth Circuit, 1944), 144 F. 2d 735, 736.

This Court has held that where the terms of the contract can be rendered by taking it by the four corners and viewing it as a whole, that manner of interpretation is most satisfactory and should be adopted.

Lesamis v. Greenberg (Ninth Circuit, 1915), 225
Fed. 449.

It is not within the province of a court to redraft a contract which the parties have executed.

Carlsen v. Security Trust & Savings Bank (1928),
205 Cal. 302, 307;

12 American Jurisprudence, Contracts, §228;

17 Corpus Juris Secundum, Contracts, §296, pages
702-707;

6 California Jurisprudence, 326, Contracts, §192.

If a contract is not ambiguous, no construction is allowable. A court will not resort to construction when the intent is expressed in clear and unambiguous language.

Ucovich v. Basile, Jr. (1938), 26 Cal. App. 2d 272, 277.

Whether the language is ambiguous or not is a question of law. A request for construction assumes that the language is ambiguous; otherwise construction could not be resorted to.

Golden Gate Bridge & Highway Dist. of California v. United States (Ninth Circuit, 1942), 125 F. 2d 872 at 875, certiorari denied, 316 U. S. 700, 62 S. Ct. 1298, 86 L. Ed. 1769.

Where the contract contains no ambiguity or uncertainty in its terms, its construction must be derived solely from the language within its borders. The reviewing court is not bound by the decision of the trial court made either without the aid of evidence or where there is no conflict in the evidence.

Layne-Wells v. Schlumberger Well Surveying Corp. (1944), 65 Cal. App. 2d 180, 184.

“The principal problem presented on this appeal consists of a determination of whether or not the language of the contract is sufficiently certain and definite to render unnecessary a resort to extraneous evidence respecting the circumstances surrounding the execution of the instrument, the situation of the parties, and their intention in executing it.”

Universal Sales Corp. v. California Press Mfg. Co. (1942), 20 Cal. 2d 751 at 760.

“The first rule respecting the interpretation of contracts is that we may not apply one of those well-

recognized rules as an aid in its construction until we shall first be satisfied that the language is fairly susceptible of two different interpretations—in other words, we cannot and should not attempt to wrench the language from its ordinary meaning.”

Beaumont v. Kittle Manufacturing Co. (1932), 122 Cal. App. 547, 549.

(In Appellants’ Opening Brief at page 18, through error a portion of the above-quoted language was incorrectly attributed to *Universal Sales Corp. v. California Press Manufacturing Co.*, *supra.*)

XI.

“Re Interest Prior to Judgment” (See XI of Argument).

“. . . We need not decide whether, in view of the fact that water and electricity are used by both public and private consumers, the department is acting solely in a proprietary capacity (compare *City of Huntingburg [Huntington] v. Morgen*, 90 Ind. App. 573 [162 N. E. 255, 257], and *Eastern Illinois State Normal School v. City of Charleston*, 271 Ill. 602 [111 N. E. 573, 575], with *Christian v. City of New London*, 234 Wis. 123 [290 N. W. 621, 623]; see, also, *Brush v. Commissioner of Int. Revenue*, 300 U. S. 352, 370-371 [57 S. Ct. 495, 81 L. Ed. 691, 108 A. L. R. 1428]), for we are of the opinion that no legitimate reason can be found for drawing any distinction, within the framework of the present case, between the governmental and proprietary functions of the city. The distinction was developed by the courts for application chiefly in cases involv-

ing the tort liability of municipal corporations, 'to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.' (*Trenton v. New Jersey*, 262 U. S. 182, 192 [43 S. Ct. 534, 67 L. Ed. 937].) It has no rational application in the present situation. The city, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and public function, irrespective of whether it is acting in a 'proprietary' or 'governmental' capacity. (*Irish v. Hahn*, 208 Cal. 339, 344 [281 P. 385, 66 A. L. R. 1382].) A single civil service system governs all classified positions in the city's service, regardless of whether they involve an exercise of governmental or proprietary functions. Manifestly, all of the city's classified employees, regardless of function performed, must be considered upon the same basis. The legal principles governing the city's obligations respecting the working conditions of water and power employees can be no different from those pertaining to any other employees. A contention similar to that made here was squarely rejected by this court in *Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 302 [168 P. 2d 741], in treating of the duty of a municipality to bargain collectively with a union of city bus line employees. . . ."

City of Los Angeles v. Los Angeles Building and Construction Trades Council (Oct., 1949), 94 A. C. A. 34, 43-44; 210 P. 2d 305, 311.

“Additional Cases in Accord With *Ingebretson* Case.”

Savings and Loan Society v. City and County of San Francisco (1901), 131 Cal. 356, 63 Pac. 665;

Columbia Savings Bank v. County of Los Angeles (1902), 137 Cal. 467, 70 Pac. 308;

Miller v. County of Kern (1907), 150 Cal. 797, 90 Pac. 119;

Spencer v. The City of Los Angeles (1919), 180 Cal. 103, 179 Pac. 163;

Powell v. The City of Los Angeles (1928), 95 Cal. App. 151, 272 Pac. 336;

Los Angeles Rock & Gravel Co. v. The City of Los Angeles (1933), 132 Cal. App. 262, 22 P. 2d 541.



